90-1647

No. _____

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

IN RE: STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

Petitioner

Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana

PETITION FOR WRIT OF MANDAMUS

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

23 April, 1991

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether mandamus should issue from this Court to remedy the district court's violation of State sovereignty by its refusal to remand *State of Louisiana, ex rel. Guste, Attorney General v. Roemer, Governor of Louisiana* to State court and by its order depriving Louisiana of its constitutional form of government and Attorney General Guste of his constitutional office.

LIST OF PARTIES

State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General; William J. Guste, Jr., in his official capacity as Attorney General of Louisiana; Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana; Honorable Charles E. "Buddy" Roemer, III, Governor of Louisiana; John N. Kennedy, Joseph N. Levin, Jr., and Carla Calobrisi, Esqs., Attorneys for Governor Roemer.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

I. ORDER AND OPINION BELOW 2

II. JURISDICTION 3

III. CONSTITUTIONAL AND STATUTORY PROVISIONS 3

IV. BACKGROUND AND SUMMARY OF ARGUMENT 3

V. STATEMENT OF THE CASE 6

A. State Attorney Representation in the Louisiana Higher Education Desegregation Case .. 6

B. The State Court Petition Removed to Federal Court, the Basis for Civil Action No. 90-4109, *State ex rel. Guste, Attorney General v. Roemer, Governor, et al.* 8

VI. REASONS FOR GRANTING THE WRIT 10

A. Removal of the State Court Petition Without Jurisdiction 10

B. Comity Abstention and Remand 14

C. Demolition of the State Constitution 22

D. Propriety of Remedy By Writ of Mandamus... 28

VII. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341 (1951) 14

Ayers v. Mabus, No. 90-6588; *United States v. Mabus*, 90-1205 (consolidated and *cert. granted* April 15, 1991) 2, 6

Bank of New Orleans and Trust Company v. Seavey, 383 So.2d 354 (La. 1980) 25

Bouchet v. National Urban League, Inc., 730 F.2d 799 (D.C. Cir. 1984) (per Scalia, J.) 10

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 14, 15

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 11

Central Elec. Co. v. La. Public Serv. Comm., 205 So.2d 389 (La. 1967) 25

Conn. Com'n v. Conn. Freedom of Information Com'n., 307 A.2d 533 (Conn. 1978) 21

Ex parte Bradley, 7 Wall. 364 (1868) 29

Ex parte Harding, 219 U.S. 363 (1911) 2, 28, 29

Ex parte Weaver, 570 S.W.2d 675 (Ala. 1990) 23, 26

Ex parte Wisner, 203 U.S. 449 (1906) 29

Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977) 21, 24, 27

Franchise Tax Bd. v. Laborers Trust, 463 U.S. 1 (1983) 11

Gardner v. Clark Oil & Refining Corporation, 383 F.Supp. 151 (E.D. Wisc. 1974) 14

TABLE OF AUTHORITIES – Continued

Page

Graddick v. Newman, 453 U.S. 928 (1981) 4, 15, 16

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 10

Hamilton Shoe Co. v. Wolf Bros., 240 U.S. 251 (1916) 20

Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1 (1st Cir. 1984), *stay denied by the full Court sub. nom. Barcelo, Governor of Puerto Rico v. Hernandez Agosto, President of the Puerto Rico Senate*, 469 U.S. 927 (1984) 2, 28, 29, 30

In re Winn, 213 U.S. 458 (1909) 29

Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) 15

Ladnier v. Mollere, 89 So.2d 301 (La. 1956) 22

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 15

Louisiana Power & Light v. Thibodaux, 360 U.S. 25 (1959) 14

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 10

Martin v. Thornburg, 359 S.E.2d 472 (N.C. 1987).. 24, 27

Maryland v. Soper (No. 1), 270 U.S. 9 (1926) 2

Massachusetts v. Feeney, 429 U.S. 66 (1976) 1, 12

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 11

North American Van Lines, Inc. v. Coleman, 633 F. Supp. 632 (N.D. Ill. 1986) 14

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989) 12, 13

Panama R. Co. v. Napier Shipping Co., 166 U.S. 280 (1897) 20

People ex rel. Deukmajian v. Brown, 624 P.2d 1206 (Cal. 1981) 21

Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 2

Saint v. Allen, 134 So. 246 (La. 1931) 27

Shamrock Oil Corp. v. Sheets, 313 U.S. 100 (1941) 11

Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) 17

Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926) 20

State ex rel. Allain v. Miss. Pub. Serv. Com'n, 418 So.2d 779 (Miss. 1982) 21

State ex rel. Baldwin v. Dubuclet, 27 La. Ann. 29 (1875) 24

State ex rel. Porterie, Attorney General v. Walmsely, 160 So. 91 (La. 1935) 27

State ex rel. Strauss v. Dubuclet, 25 La. Ann. 161 (1873) 24

State of Louisiana, ex rel. Guste v. Texaco, Inc., 433 So.2d 756 (La. App. 1st Cir. 1983) 23

State of Louisiana, ex rel. Guste v. United States, No. A-127, Oct. Term 1989 1

State of Minnesota, ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) 24

TABLE OF AUTHORITIES – Continued

Page

State v. Texas Co., 7 So.2d 161 (La. 1942) 27

State v. Bank of Louisiana, 5 Mart. (N.S.) 327 (1827) 27

Superintendent of Ins. v. Attorney General, 558 A.2d 1197 (Me. 1989) 21

Taylor v. Anderson, 234 U.S. 74 (1914) 12

Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894) 11

United States v. Louisiana, 692 F.Supp. 642 (E.D. La. 1988) 18

United States v. Louisiana, 718 F.Supp. 499 (E.D. La. 1989) 18

United States v. Providence Journal Co., 485 U.S. 693 (1988) 4, n.2

U.S., for Owens-Corning Fiberglass Corp. v. Brandt Construction Company, 826 F.2d 643 (7th Cir. 1987) 13, 14

Virginia v. Rives, 100 U.S. 313 (1880) 29

White v. Weiser, 412 U.S. 783 (1973) 17

Williams v. State thru Office of Motor Vehicles, 538 So.2d 193 (La. 1989) 22

CONSTITUTIONAL PROVISIONS:

U.S. Constitution:

Louisiana Constitution:

Article IV:

Section 8 ..... 7, 8, 12, 25, 26, 28

Section 13 25

TABLE OF AUTHORITIES – Continued

Page

Section 16 25

Section 17 25

Section 18(c) 25

Article VIII:

Section 5 3

Section 6 3

Section 7 3

Section 8 3

Article XIII:

Section 1 3

Section 2 3

Article XIV:

Section 18 3

STATUTORY PROVISIONS:

Congressional Acts:

28 U.S.C. §1254 3

28 U.S.C. §1441 10

28 U.S.C. §1651 ..... 1, 3

TABLE OF AUTHORITIES – Continued

Page

Louisiana Revised Statutes:

La. Act 21, 1872 (2d Sess.) 3

La. Act 448 (Reg. Sess. 1988) 3

La. R.S. 13:5036 ..... 3, 12, 28

La. R.S. 49:257(B) 3, 12, 28

RULES OF COURT:

Supreme Court Rule 8 1

MISCELLANEOUS:

13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3522 (1975) 10

Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L.Rev. 765 (1977) 28

RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: JOURNAL OF PROCEEDINGS, Vol. I, p. 3 25

RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS, Vol. XI, p. 173. 26

William J. Guste, Jr., Attorney General of Louisiana, respectfully prays, pursuant to 28 U.S.C. §1651 and Rule 20, that a writ of mandamus issue to the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana, directing him to vacate the Judgment issued on the merits of Civil Action No. 90-4109, *State of Louisiana, ex rel. William J. Guste, Jr., Attorney General, Plaintiff v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph N. Levin, Jr., and Carla Calobrisi, Defendants,* lately pending in state court but removed to federal court by defendants therein, and to remand the cause to the Civil District Court for the Parish of Orleans, Louisiana, whence it came.

Attorney General Guste's state court petition raises questions arising exclusively under the State Constitution and laws, *viz.*: who is the State's legal representative in court – the Attorney General or the Governor? This Court has wisely left such internal disputes in the hands of state judges, where they belong. *Massachusetts v. Feeney,* 429 U.S. 66, 67 (1976) (certifying to the Massachusetts Supreme Judicial Court the question whether the Attorney General may prosecute an appeal over the objections of the Governor). This vital question of allocation of State sovereignty was before this Court in No. A-127, Oct. Term 1989, *State of Louisiana, ex rel. Guste v. United States,* which was Attorney General Guste's application for a stay of the district court's remedial orders in the Louisiana higher education desegregation case. Governor Roemer opposed the Attorney General's application for a stay, telling this Court: "[T]he Governor, as Louisiana's chief executive officer, has the constitutional authority and responsibility to determine the position and policy of the State in this litigation and all other to which the State is a party or in which the State has an interest." Motion to Dismiss Appeal of William J. Guste, Jr., No. 89-556, Oct. Term 1989, pp. 13-14. The Governor's counsel wrongly accused Attorney General Guste of making "false representations to this Court . . . ris[ing] to the level of 'conduct unbecoming a member of this Court' . . . . " *Id.*, p. 19. Not only did the Governor's counsel misquote Supreme Court Rule 8 ("conduct unbecoming a member *of the Bar* of this Court"), but Your Honors granted General Guste's application for a stay on August 18, 1989.

The district court below has stripped Louisiana's Attorney General of his constitutional office; worse yet, it has restructured Louisiana's constitutional form of government in violation of the language and history of Louisiana's Constitution of 1974 and a century of Louisiana Supreme Court decisions holding that the Attorney General is the exclusive legal representative of the State. Such extraordinary intrusion into Louisiana's sovereignty imperatively calls for application of "the exceptional rule" of mandamus here, *Ex parte Harding,* 219 U.S. 363, 379 (1911) (per White, C.J.), to control the district court's lawless usurpation of the role of state courts in our federal system. *Accord, Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1 (1st Cir. 1984), *stay of mandamus denied by the full Court sub. nom. Barcelo, Governor of Puerto Rico v. Hernandez Agosto, President of the Puerto Rico Senate,* 469 U.S. 927 (1984).

Moreover, the district court has resolved the dispute between Attorney General Guste and Governor Roemer in flagrant disregard of the strict rules governing removal jurisdiction and "the considerations of comity between state and federal courts" which Your Honors have said warrant mandamus here. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 31 (1943), citing *Maryland v. Soper (No. 1),* 270 U.S. 9, 29 (1926).

The cloud cast over Attorney General Guste's authority to defend Louisiana's higher education system in federal court must be removed immediately. Otherwise Louisiana will continue to speak with two voices in an agonizing field which Your Honors have recently agreed to review in the Mississippi case.[1]

I. ORDER AND OPINION BELOW

On October 30, 1990, the U.S. District Court below entered, in consolidated cases Nos. 80-3300 and 90-4109 on the docket of the United States District Court for the Eastern District of Louisiana, an "Opinion and Order on the Representation of the State" and a "Judgment" pursuant to such Opinion and Order. App., pp. 2a-30a. The Judgment as to case No. 90-4109 ordered "that the

---

[1] *Ayers v. Mabus,* No. 90-6588; *United States v. Mabus,* 90-1205 (consolidated and *cert. granted* April 15, 1991).

petition of William J. Guste for declaratory judgment (Civil Action No. 90-4109) is DENIED on the merits at his cost" and as to case No. 80-3300 ordered, in pertinent part, "that John N. Kennedy and Joseph J. Levin Jr. are designated as sole trial counsel representing the State of Louisiana in Civil Action No. 80-3300 and that William J. Guste, Attorney General, is authorized to appear in Civil Action No. 80-3300 solely as an amicus curiae."

On November 28, 1990, the Fifth Circuit, without giving reasons, denied a virtually identical petition for writ of mandamus as sought herein from this Court. App., p. 1a.

In a separate judgment also entered on October 30, 1990, the district court reversed its previous judgment on the merits of liability in Civil Action No. 80-3300 and, finding no violations in Louisiana's higher education system, entered final judgment in favor of defendants and against complainant U.S.A. App., p. 31a.

II. JURISDICTION

Jurisdiction to grant the writ of mandamus sought by petitioner is conferred on this Court by 28 U.S.C. §1651 in aid of its jurisdiction pursuant to 28 U.S.C. §1254.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Construed and interpreted, explicitly or implicitly, were Art. IV of the Louisiana Constitution (1974); Louisiana Revised Statutes, Title 13, Section 5036 (La. R.S. 13:5036); La. R.S. 49:257(B), enacted in 1988 (Act 448); and Act 21 of the Second Session of 1872. Also bearing upon the issues herein are Art. VIII, §§5, 6, 7 and 8; Art. XIII, §§1 and 2; and Art. XIV, §18, of the Louisiana Constitution (1974). These provisions are set forth *verbatim* in App., pp. 36a-46a.

IV. BACKGROUND AND SUMMARY OF ARGUMENT

The focus of the controversy is whether the State of Louisiana, by its Constitution, has allocated to its Attorney General or to its Governor the internal sovereign, governmental power to be the State's lawyer and to control the advocacy of the State when sued in litigation as a separate party in its own name. Respondents Kennedy, Levin, and Calobrisi ("Governor's counsel") in Civil

Action No. 80-3300, *U.S.A. v. La.*, were the initiators and chief proponents of the abolition of pertinent provisions of Louisiana's own State Constitution – an invalidation not sought by complainant U.S.A., not within the scope of liability found on summary judgment, and beyond the pleadings' theory of the case. General Guste, on the other hand, seeks to protect Louisiana's constitutional and statutory provisions against destruction by federal judicial decree.[2] Louisiana has a right to a good faith legal defense from its Attorney General, not from counsel who advocate the Governor's irreconcilable political agenda as his proffered policy for the State.

When the Attorney General sought a definitive resolution of these State law issues in State court, Governor Roemer removed the State court action to Federal court where it became Civil Action No. 90-4109 and was consolidated with 80-3300. Citing no need to follow this Court's pronouncements and teachings on comity abstention and certification to State court of State attorney representation questions, the district court proceeded to decide these issues itself, even though the State court suit sought to resolve these State law issues for a number of situations wherein it has recently arisen, not merely for *U.S.A. v. Louisiana* alone.

The district court repudiated the Opinion of Justice Rehnquist explaining the significance of this Court's denial of a stay in *Graddick v. Newman*, 453 U.S. 928, 937 (1981), and, having reinterpreted that case in opposition to Justice Rehnquist's explanation, applied it as Federal authority for depriving the Attorney General of the proper constitutional powers of his State office and for bestowing upon Governor's counsel purported State constitutional powers actually denied to them by Louisiana's Constitution. Casting ethical aspersions upon General Guste, the district court disqualified the Attorney General from representing the State on the grounds of his alleged inactivity during the remedy-fashioning portion of the bifurcated proceedings, even though:

---

[2] The Attorney General has no objection to the Governor appearing as amicus curiae to express his views in support of the district court's judgment on remedy. See *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988). In fact, the Attorney General proposed such a procedure in a spirit of compromise by letters to Governor Roemer dated Sept. 29, Dec. 21, 1989 (App., pp. 50a-52a), and in a personal meeting with the Governor.

(1) The Attorney General and his staff were original counsel for the State of Louisiana and represented it as *sole* counsel from the outset of the litigation on March 14, 1974, through the initial pleadings, discovery, negotiation and implementation of the Consent Decree, trial on liability *via* cross motions for summary judgment, and the court's denial of certification for appeal of the interlocutory order on violation, all prior to enrolling Governor's counsel as *additional* counsel for purposes of the State's being coerced to help fashion unwanted remedies under the protest of its prior objections and defenses;

(2) The entirety of the remedial proceedings took place subject to the timely objections and defenses already asserted for the whole case by the Attorney General;

(3) The Attorney General promptly reasserted those objections and defenses upon the merger of the whole case into final judgment ordering remedial injunctive relief and General Guste promptly countered the attempts then made by Governor's counsel, purportedly on behalf of the State, seeking immediate abolition of State constitutional and statutory provisions by their opposing all motions for new trial and/or stay of judgment;

(4) General Guste again made known his objections and defenses at the first opportunity given him by the district court, after the remand by the Fifth Circuit Court of Appeals for the purpose of allowing the single-judge district court to enter an assuredly valid final judgment, and;

(5) The district court's seemingly all-important previous remedial proceedings are now inconsequential by virtue of the district court's new Final Judgment reversing its previous liability judgment and not finding no violation.

The court below has transmogrified the 1974 Louisiana Constitution into a grotesque sham unrecognizable to its redactors and ratifiers, shifted from one State officer to another, internal sovereign powers in contravention of the allocation made by the State Constitution, and foisted upon the State of Louisiana an Executive form of government specifically rejected by its redactors. The continuing existence of this district court Judgment on the State attorney representation issue can only be considered an ongoing embarrassment to the ideals of federalism and a mockery of the jurisdictional principles of comity supported and required by this

Court through the years. Meanwhile, the appeal on the merits of Louisiana's higher education desegregation case languishes in the Fifth Circuit, with Louisiana in legal limbo.[3] This Court's power to issue the extraordinary writ of mandamus is General Guste's last hope for an immediate and adequate remedy.

V. STATEMENT OF THE CASE

A. State Attorney Representation in the Louisiana Higher Education Desegregation Case

The dispute between the Attorney General and the Governor was already in existence in *U.S.A. v. La.* at the time it was previously pending before this Court.[4] It arose on the district court level after the bifurcation of the case ended and upon the entry of the final judgment, which ordered remedies abolishing the popularly chosen four-board system of higher education governance explicitly established and mandated by the State Constitution and implementing laws. The Governor's counsel persisted in seeking immediate abolition of those State constitutional and statutory provisions by opposing Attorney General Guste's motion for a stay of execution of judgment, which this Court granted on August 18, 1989.

Prior to that, however, the Attorney General and his Assistant Attorneys General had been the original counsel of record for the State of Louisiana in the litigation from its outset on March 14, 1974, until the District Court's October 30, 1990 Judgment and Opinion and Order complained of herein, and were the *sole*

---

[3] The United States has urged the Fifth Circuit "to hold this case until the Supreme Court has fully disposed of *Ayers*." Brief for the United States, No. 90-3874, p.10 (filed April 11, 1991).

[4] Most of the major documents up to that time on the merits of the case, including the original and amended complaints, the Consent Decree, the pertinent motions for summary judgment and related memoranda, the judgments and orders of the district court, and the report of the Special Master, as well as the constitutional and statutory provisions involved therein, were printed in the Joint Appendix to the Jurisdictional Statements in Nos. 89-556 and 89-557, hereinafter simply "Joint App. No. 89-556."

counsel of record enrolled for the State of Louisiana from the commencement of this suit until January 20, 1989, when General Guste, for the remedial part of the bifurcated trial, empowered Governor's counsel with a delegation of the Attorney General's own power to represent the State, which under the general provisions of Art. IV, §8, of the Louisiana Constitution of 1974 is withdrawable at the Attorney General's pleasure.

The Attorney General and his Assistant Attorneys General had already firmly established the official legal position and defenses of the State in the litigation for the whole case – *viz.*, that no remedial injunction prayed for was permissible because no constitutional, statutory, or other policy or practice of the State constituted a violation for which a remedy could lawfully be fashioned as far back as the State's May 10, 1974 answer. General Guste faithfully adhered to this official State legal position throughout the case.[5]

When, after the case merged together again in the final judgment, Governor's counsel persisted in seeking immediate abolition of State constitutional and statutory provisions by opposing motions for new trial and by opposing motions for stay of execution of judgment, the Attorney General, considering a conflict of interest between Governor's counsel and the State, withdrew, by written letters dated August 11, 1989 (App., pp. 64a-67a the authority he had delegated to them to represent the State as

---

[5] The cosmetization performed in footnote 2 of the Opinion and Order of the district court below (App., p. 6a) masks the poignant truth revealed by the Record and the uncontradicted affidavit of former assistant attorney general Winston G. Decuir (App., p. 53a):

> "Sometime after Charles E. "Buddy" Roemer, III, was elected Governor, but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation."

See also the letter written to the district court by John N. Kennedy (App., p. 57a), wherein he admitted representing only the Governor during this period of time.

additional counsel and filed in the district court a motion redesignating counsel for the State. The district court held the motion in abeyance for more than a year while Governor's counsel continued to claim constitutional authority to represent Louisiana, including appearances as the Bar of this Court.

In the meantime, this dispute spread into other cases and areas of government, as Governor's Special Counsel Kennedy began insisting that the power allocated by the State Constitution to the Attorney General resided in the Governor.[6] Therefore, the Attorney General filed a petition for declaratory judgment and injunctive relief in State court to settle this vital question of State law. However, that State court action became Civil Action No. 90-4109 in the Federal district court below and the subject of this Petition for Writ of Mandamus.

B. The State Court Petition Removed to Federal Court, the Basis for Civil Action No. 90-4109, *State ex rel. Guste, Attorney General v. Roemer, Governor, et al.*

The State Court Petition, which was denied on the merits by the federal court, below sought declaratory relief

> "declaring (1) that the STATE OF LOUISIANA has an inherent and sovereign right and interest in the legal subsistence and efficacy of its constitution as a whole, and to a full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution declared invalid by the federal district court in *USA v. Louisiana;* and (2) that it is unconstitutional under La. Const. Art. IV, Sec. 8 (1974) for Governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in *any* civil or criminal action or proceeding; and (3) that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of

---

[6] A member of the Attorney General's staff received information from a staff member of another agency that John N. Kennedy had telephoned and instructed certain agency employees not to send over to the Attorney General for legal defense the petitions, complaints, and other pleadings in certain lawsuits, because the Governor's office was taking over that function of government.

> Louisiana in *USA v. Louisiana* was not authorized in law, was *ultra vires* and was unconstitutional, from the date of their lawful termination as attorneys for the State of Louisiana on August 11, 1989 until the present day, and that therefore all acts and statements by KENNEDY, LEVIN and CALOBRISI as a putative legal representative of the State during this period were null and void *ab initio.*"

State Court Petition, p. 9 (App., pp. 78a-79a)

The allegations of the State Court Petition raise only State law questions – *viz.*, (1) how Louisiana State Constitution and laws allocate the State's internal, sovereign legal representation power between two of its State constitutional officers; and (2) what are the State law duties of public attorneys representing the State to provide full and good faith defenses of State constitutional provisions.

Under the well-pleaded allegations of the State Court Petition, the cause of action alleged therein, on its face, does not arise under nor is determined by the Constitution, laws, or treaties of the United States, but rather arises solely under and is determined solely by the Louisiana State Constitution and laws enacted pursuant to it.

A hearing on a preliminary injunction was actually set, prior to defendants' notice of removal, for Friday, October 26, 1990, but was perforced cancelled as a result of defendants' notice and act of removal of the State Court Petition to Federal district court. Attorney General Guste filed a motion for immediate summary remand, for nullification of removal, for costs, expenses, and attorneys' fees, and for imposition Fed. R. Civ. Proc. Rule 11 sanctions, together with an alternative motion to remand in the same substance and a motion for an expedited hearing thereon, based upon the lack of removal jurisdiction apparent on the face of the State Court Petition.

The U.S. district court did not hold a hearing on any of the remand motions or conduct any trial or other hearing on the merits of the State Court Petition in Civil Action No. 90-4109. Rather, it exercised jurisdiction over it during the midst of proceedings already begun in Civil Action No. 80-3300, issued the judgment

denying the State Court Petition on the merits, and, with regard to the State Court Petition and action, castigated Attorney General Guste for (App., p. 28a) "being disrespectful of this Court's jurisdiction."

VI. REASONS FOR GRANTING THE WRIT

A. Removal of the State Court Petition Without jurisdiction

If the State court Petition removed in this case were filed originally as a complaint in a Federal district court, it would have to be dismissed for lack of subject matter jurisdiction. Because the lack of such jurisdiction is plain on the face of the Petition, the Federal district court should, upon initial receipt and review of the pleading, immediately issue the dismissal *sua sponte*. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3522 at 48 & n.12 (cases) (1975), as cited in *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 805 (D.C. Cir. 1984) (per Scalia, J.)

For the same reasons, the United States district court in this case should have already remanded the removed petition herein *sua sponte*. Every day that the Federal courts below hold up the State court proceeding based on this jurisdictionally defective removal, they give effect to the needless and unfair delay for which the removal appears to have been interposed.

1. The defendants' removal does not comport with 28 U.S.C. §1441 and the controlling precedents. This Court recognized, early on, the fundamental significance of removal to the constitutional system of a delicately balanced federalism existing between the Federal government and the several states – "the question of state power in our federal form of government." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 117 (1936).

The removal statutes must be strictly construed, for removal impinges upon a State's sovereignty in the exercise of its judicial power:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' " [Citing cases]

Shamrock Oil Corp. v. Sheets, 313 U.S. 100, 108-09 (1941). Thus:

> "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. . . . The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." [Citing *Gully, supra*]

Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987).

Removal of *Guste v. Roemer* to Federal court not only abridges "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts," *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (per Stone, J.), but cavalierly ignores "[t]he century-old jurisdictional framework governing removal of federal questions from state into federal courts," *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), quoted in *Caterpillar Inc. v. Williams*, 482 U.S. at 386, 392-93.

Plainly Congress "did not intend to authorize a removal where the cause of action depended solely on the law of the State," *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 462 (1894). Attorney General Guste's "well pleaded complaint," *Franchise Tax Bd. v. Laborers Trust*, 463 U.S. 1, 9

(1983), depends solely on the law of Louisiana. There is not a whisper of a federal question "in the plaintiff's statement of his own claim in the bill or declaration," *Taylor v. Anderson*, 234 U.S. 74, 75 (1914). "Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States." *Id.* at 76.

As recently at 1989, this Court emphatically reaffirmed these rules when, for the second time, it had to correct a Circuit Court of Appeals, in order to cause a remand of an improperly removed State court action. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). Therein, Your Honors reiterated the "well-pleaded complaint rule" emphasizing that the Federal question jurisdiction must appear solely from the cause of action pleaded on the face of the State court Petition alone, " 'unaided by anything alleged in anticipation for avoidance or defenses which it is thought the defendant may interpose.' " 109 S.Ct. at 1521, quoting *Taylor v. Anderson*, 234 U.S. at 74, 75-76.

A reading of the well-pleaded allegations of the State court Petition reveals that it raises solely predominant internal State law questions – (1) whether the State Governor or the State Attorney General has been allocated by the State Constitution the State governmental power to be the attorney for the State itself as a separate party and to control the presentation of the sovereign State's case in any civil litigation (State or Federal); (2) what are such attorney's duties to the State with respect to defending State constitutional and statutory provisions. Such issues can be decided and determined only by a delicate interpretation, clarification, and application of State Constitution and law – including, nonexclusively, Article IV, §§5 and 8, of the Louisiana Constitution of 1974; La. R.S. 13:5036; and La. R.S. 49:257(B). Only State courts of Louisiana can definitively interpret and apply this State constitutional and statutory law to the factual circumstances alleged in the State court Petition removed herein. *Accord, Massachusetts v. Feeney*, 429 U.S. 66, 67 (1976).

2. Removal cannot be based on common issues of fact and law between (1) a *State law question* raised in the State court Petition sought to be removed and (2) an assertedly

identical *State law question* already pending before a U.S. district court in another altogether different Federal question case merely as an auxiliary issue therein and before that Federal court on the basis of that court's mere pendant jurisdiction. Such is the fundamental error in defendants' attempt to remove the State court action herein, and it strikes at the very basis they gave for the removal.

The district court below held that, under Federal law, it, not the State court, had jurisdiction and "control [of] such issues." (App., p. 15a). In *Oklahoma Tax Commission v. Graham, supra*, the complaint itself, by identifying "the parties subject to the action," 489 U.S. at 840, provided information that taxes were being sought from Tribal Indians for activities conducted on an Indian Reservation. The mention of information which might indicate the presence of exclusive Federal jurisdiction "inherent in the complaint," *id.*, did not change the nature of the action alleged nor its arising under only State law. Here, the mere mention in the State Court Petition of Federal Civil Action No. 80-3300 as one particular instance, among others, wherein Governor's counsel has wrongly claimed and purportedly exercised the Attorney General's constitutional powers does not, under the *Graham* rationale, turn clearly State law issues into ones arising under Federal law.

a. First of all, the Attorney General's Motion to Designate Counsel in *U.S.A. v. Louisiana* does not raise the State law questions presented in the State court Petition, but was an exercise of the State power that that State court Petition seeks to clarify. The motion sought only the Court's formal recognition of such designation for the limited purposes of notice, service, and orderly procession of the litigation.

The Seventh Circuit in *U.S. for Owens-Corning Fiberglass v. Brandt Const.*, 826 F. 2d 643, 647 (7th Cir. 1987), held that a U.S. district court does not "acquire jurisdiction over [an] improperly removed . . . case by consolidating it with [a] related and properly filed . . . case." The Court

said that an improperly removed case was not properly pending before the district court so as to be susceptible to consolidation under Fed. R. Civ. Proc. Rule 42(a). Likewise, the district court here has unlawfully consolidated the removed case with *U.S.A. v. Louisiana* in direct contravention of the rule of law explained in *Brandt. Accord, Gardner v. Clark Oil & Refining Corporation,* 383 F.Supp. 151, 154 (E.D. Wisc. 1974); *North American Van Lines, Inc. v. Coleman*, 633 F. Supp. 632 (N.D. Ill. 1986).

B. Comity Abstention and Remand

The internal State law questions presented by the State attorney representation question in Civil Action No. 80-3300 and by the State Court Petition in No. 90-4109 clearly invoke the doctrine of abstention required by this Court on the basis of comity in the genre of cases represented by *Louisiana Power & Light v. Thibodaux,* 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341 (1951). In the *Louisiana Power & Light* case, the City of Thibodaux brought in State Court an eminent domain proceeding which was removed to Federal Court on the basis of diversity of citizenship (not a grounds for removal herein). The U.S. district court stayed the Federal proceedings to let the State courts resolve the internal State question of whether State law had allocated to the City of Thibodaux the power and authority to expropriate the property. After the U.S. Court of Appeals reversed, this Court reversed the Fifth Circuit and reinstated the U.S. district court's order. An unsettled question regarding the allocation of a sovereign State's own governmental power among the State governmental infrastructure is precisely the same kind of issue presented herein regarding the State Constitution's allocation of legal representation power among State constitutional officers.

The district court's attempt to decide this question herein, instead of abstaining from it in No. 80-3300 and remanding it in No. 90-4109 to the State judiciary, disrupts

the uniform development and application of state constitutional law on this issue. *Cf. Burford, supra*, 319 U.S. at 333-34; *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968). That the district court reached out to decide a fundamental question of Louisiana constitutional law does not, of course, mean that it decided it right: "The Fifth Circuit's willingness of certify is in part a product of frequent state court repudiation of its interpretations of state law." *Lehman Brothers v. Schein*, 416 U.S. 386, 390 n.6 (1974).

The contention of Governor's counsel in their removal papers (App., pp. 91a-92a) that the cause of action pleaded in the State court Petition arises under the "Federal common law" of *Graddick v. Newman*, 453 U.S. 928 (1981), is plainly wrong.

Graddick does not constitute the authority that defendants persist in citing it for; specifically, *Graddick v. Newman* does not hold "that a state's governor is the proper representative of the state in litigation to which the state is a party." Defendants' *Notice of Removal of Case Pursuant to 28 U.S.C. Sec. 1441*, p. 2, ¶5. (App., p. 85a).

The opinion of Justice Rehnquist, issued after consideration and denial of the stay by the full Court, denies *Graddick* as being Federal case authority for the contentions made by Roemer, Kennedy, Levin, and Calobrisi and implied by the district court below. As recited in the opinions of Justices Powell and Rehnquist therein, Governor James was seeking neither to be the attorney for his State nor to provide legal representation for his State; his interest was as a separate party himself in his own person and as the "Receiver," under both earlier court order and Alabama statute, of the Alabama prison system. Governor Roemer is neither a party to *U.S.A. v. Louisiana* nor the "Receiver" of the Louisiana higher education system.

Nor does *Graddick* lessen any powers of any Attorney General to represent the State, if it is a party, or the State's interests, even if it is not. While defendants continually refer to the language by Justice Powell regarding Attorney General Graddick's lack of standing and prolonged inactivity in the case, the opinion by Justice Rehnquist clarifies that such language was not a holding by the full Court:

> "The Court has decided to deny a stay. Had this result been communicated without explanation, the parties might well have been left with the impression that the full Court adopted the rationale of Justice POWELL'S opinion accompanying his denial of the original application, *i.e.*, that applicant [Attorney General Graddick] lacks standing to seek a stay. I write separately to emphasize my view that such an impression would be erroneous." 453 U.S. at 938.

Attorney General Graddick was found to be a party himself to the litigation, and, as to his inactivity, Justice Rehnquist explained:

> "[I]t has been argued that applicant's lack of active participation as a party in this litigation prior to the District Court's release order somehow weakens his claim of standing as a party. I am aware, however, of no rule that conditions party status on the appearance of activity or results in automatic dismissal from the lack thereof." 453 U.S. at 940-41.

But most importantly for purposes of the removal and remand issues herein, Justice Rehnquist showed that Attorney General Graddick's authority to act on behalf of the State's interests *was governed by State law*, not Federal law. The governing law was found to be two Alabama statutes and State court jurisprudence thereunder, all of which left no doubt as to the Attorney General's authority:

> "These two statutes, taken together, convince me that the Attorney General possesses ample authority under Alabama law to seek a stay of the release order, *with or without the consent of the Governor*. But any doubts about applicant's authority could have been resolved by adopting the course this Court pursued in *Massachusetts v. Feeney*, 429 U.S. 66, 97 S.Ct. 345, 50 L.Ed.2d 224 (1976), and certifying the question to the State's highest court." 453 U.S. at 942-43 (emphasis added).

Thus, *Graddick* itself recognizes that the cause of action removed in No. 90-4109 raises only State law questions of

which the Federal district courts do not have original jurisdiction and that these issues – including not only those raised in the State court Petition but also the State attorney representation issue in *U.S.A. v. La.* – are ultimately controlled by State law.

1. During the remedy proceedings, the Governor's counsel advocated, not the official State's legal position already established by the Attorney General protecting and defending the official policy interests of the state "as expressed in [its] statutory and constitutional provisions," *White v. Weiser*, 412 U.S. 783, 795 (1973), but rather the contrary and irreconcilably conflicting Governor's own personal and political agenda constituting his mere "proffered" policy for the State, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197 (1972). In this regard, the proposals of Governor's counsel for remedy made no attempt whatsoever to protect the explicit State's constitutionally and statutorily mandated four-board structure of higher education governance; they suggested, only alternatively, the Governor's political agenda for changing the State Constitution's higher education governance to a single-board system.

After being enrolled, Governor's counsel did not confer with the Attorney General about and did not obtain Attorney General Guste's consent to their remedial filings and arguments.[7]

---

[7] The district court's confusion of the Attorney General's consent to enroll Governor's counsel to render remedial ideas during remedy proceedings (after their approval of the Attorney General's defense of the State's constitutional and statutory policies during the liability proceedings) with the actual contrary filings and arguments made by them thereafter, all for the purpose of endeavoring to estop the Attorney General from further asserting, after merger of the bifurcated proceedings upon entry of final judgment, the State's already established defenses for the whole case, constitutes a baseless, legally erroneous, and meaningless conceit at odds with the uncontradicted affidavit of Attorney General Guste (App., pp. 47a-48a):

> "I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to allow him to tender whatever remedial ideas he had to the Court. Throughout the

(Continued on following page)

Plaintiff United States did not seek, in its complaint, in its motion for summary judgment on violation, nor otherwise, to have the State's four-board structure invalidated. Instead, the United States' complaint and motion for summary judgment sought only a declaration of violation with respect to vestiges remaining from prior *de jure* segregation policies. As early May 10, 1974, the answer filed by the Attorney General on behalf of the State revealed that Louisiana's four-board structure did not come into existence until more than a decade after the end of *de jure* segregation in the State's public colleges and universities and, therefore, was not and could not be one of "the remaining vestiges of the former *de jure* segregated system" (692 F. Supp. at 658; Joint App. No. 89-556, p. 35a). In lieu of evidence on the matter, the court below 718 F.Supp. at 505; Joint App. 89-566, p. 45a) ruled that it was a "*truism*" that the State Constitution's four-board structure violated Title VI of the 1964 Civil Rights Act and proceeded therefrom to order the single-board structure as a remedy to correct the asserted *truistic* violation.

2. Governor's counsel then brought to fruition their conflict of interest against the State after merger of the

---

(Continued from previous page)

remedial stage of these proceedings, however, it was my firm belief, and it remains my firm belief, that it is beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure which is protected by Louisiana's Constitution.

"Whatever the Governor's policy position, it is my sworn duty as Attorney General to defend Louisiana's Constitutional and statutory provisions against judicial orders that impinge upon Louisiana's sovereignty. I intend to do so.

"It was not my intention in permitting the enrollment of the Governor's special counsel to waive my professional legal judgment or my constitutional duty as Attorney General of Louisiana regarding Louisiana's multiple-board system of higher education. Nor have I ever given consent to the abolition of our State's multiple-board system by federal judicial decree, as does the Governor's special counsel."

bifurcated case was effected by the entry of the final judgment, the remedial decree of July 19, 1989. At that time, the Board of Supervisors for Southern University and A. & M. College ("Southern") had filed motions for new trial and/or to alter and amend judgment and for a stay of execution of judgment. These motions were designed to advocate the validity of the State's constitutional and statutory provisions establishing and mandating the popularly-chosen four-board higher education governing system that had been ordered abolished within thirty days of the judgment and to preserve them and a meaningful judicial review on appeal of the ordered abolition. Governor's counsel, purporting to act on behalf of the State, filed oppositions to both of these motions and thereby sought immediate abolition of these provisions of State Constitution and law. The district court issued a Minute Entry doubting Southern's standing to file the motion and expressly and specifically citing the lack of supportive filings from the Attorney General. It was in prompt and direct response to the district court's own Minute Entry that the Attorney General made those supportive filings and eventually joined with the parts of Southern's motions designed to protect the constitutional, statutory, and other official policies of the State[8].

On appeal to this Court, Governor's counsel continued their professional conflict of interest against the State by opposing, purportedly on behalf of the State, the stay applications in A-126 and A-127 and by attempting to dismiss the State's appeal, *Ex rel. Guste*, in No. 89-556. It was only when it became apparent that Governor's counsel were hardened in their conflict of interest to invalidate Louisiana's constitutional and statutory provisions that Attorney General Guste sent them the August 11, 1989, letters (App., pp. 64a-67a)

---

[8] It is a mystery how either the district court or any of the parties could be surprised at the Attorney General's filings, given all the pleadings, objections, and defenses filed by the Attorney General for more than fourteen years throughout the case since its inception, the district court's own Minute Entry, and the fact that Southern's motions sought to protect the State's interests in its constitutional and statutory provisions, while those of Governor's counsel sought immediate abolition of them.

terminating and withdrawing the authority he had given them to represent the State.

Apparently agitated that, in the district court's own mind, "Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring this case before the United States Supreme Court," (App., p. 12a) the district court disqualified the Attorney General from the State constitutional power of his State office to provide the legal defense of the State's constitutional and statutory provisions in this case. In so doing, the district court appears to have deluded itself into thinking that the whole case started with the remedy-fashioning part of the bifurcated proceedings and that all the pleadings, objections, and defenses that has gone before were all for naught. This plainly ignores the jurisprudence of this Court to the effect that all of the proceedings prior to final judgment, including those leading to interlocutory orders, "become merged in the final decree," *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926), and that this Court or other proper appellate court, upon "reviewing the final decree . . . , is called upon to notice and rectify any error that may have occurred in the interlocutory proceeding," *Hamilton Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916), or in "the whole case," *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 284 (1897).

General Guste, of course, was not attempting to "reverse" the State's purported legal position established by Governor's counsel but was continuing to assert the State's official legal position which he had already established early on for the whole case but which was deviated from by Governor's counsel when they brought their conflict of interest to full fruition after entry of the final decree.

On October 30, 1990, the district court entered a final judgment reversing its prior judgment on liability and now finding no violations. Ironically, the district court has disqualified the Attorney General for being inactive in inconsequential remedial proceedings and has denied the right of the Attorney General to defend on appeal the State's now successful defense on liability at the trial (on summary judgment) in which the Attorney General was the *sole* advocate on behalf of the State. The district court has empowered and appointed Governor's counsel to represent the State on appeal merely because they were "active" in the now

inconsequential remedial proceedings but were not even enrolled in the litigation during the proceedings on liability.

3. Rejecting the foundations of constitutional democracy and republican government, the district court erroneously held that (App., p. 25a) "[t]he issue is who establishes policy for the State in this litigation, not who is the real client" and that (App., p. 27a) "the Court must reject as lacking in legal support Mr. Guste's efforts to have his choices predominate over those of the Governor." The "choices" advocated throughout this litigation by the Attorney General have not been *his* at all but rather those of the people of the State ratified in *their* Constitution and those legitimately made in State's statutes by their elected representatives.[9] The Governor has no authority to have his choices predominate over those of the people as expressed in the State Constitution nor over those of the people's representatives as expressed in State statutes, even if the district court likes the Governor's policy choices better than those of the people and the legislature and locks them into the State's defense by empowering Governor's counsel

---

[9] *People ex rel. Deukmajian v. Brown*, 624 P.2d 1206 (Cal. 1981), upon which the Governor's counsel rely, is clearly distinguishable. Attorney General Guste has not sued the Governor; nor is Attorney General Guste guilty of any ethical impropriety in this case. Rather, as an accommodation to Governor Roemer, the Attorney General permitted the Governor's counsel to advocate a single-board remedy before the district court as an alternative remedy under protest, but the Attorney General never abandoned his original position and first alternative that such a remedy would violate the state Constitution and was impermissible. *See* his uncontradicted affidavit (App., p. 47a). The Attorney General did not advise the Governor to the contrary, as was the case in *Deukmajian v. Brown*. At any rate, "we are not dealing with private lawyers. Rather, different ethical considerations are at stake here." *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1202 (Me. 1989). The majority of courts confronting similar issues have recognized the unique status of the Attorney General. *Id.* at 1203; *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); *State ex rel. Allain v. Miss. Pub. Serv. Com'n*, 418 So.2d 779, 783-84 (Miss. 1982). "This special status of the attorney general – where the people of the state are his clients – cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office." *Conn. Com'n v. Conn. Freedom of Information Com'n*, 307 A.2d 533, 537 (Conn. 1978). Attorney General Guste is guilty of no ethical breach here. To the contrary, he is fulfilling his constitutional and statutory duties to defend the State's Constitution and laws faithful to the sovereign will of the people of Louisiana.

to be the sole attorneys for the State and by disqualifying the Attorney General.

The Louisiana 1974 Constitution embodies the consent of the governed and the terms and conditions of thier governance. Abolition of its mandatory policies (such as the four-board higher education governing system) cannot be sought or effected by officers of the State except in accordance with Article XIII amendment procedure. Such constitutional policies cannot be *de facto* nullified by legislation or gubernatorial action. *Williams v. State,* 538 So.2d 193 (La. 1989). Nor can their abolition be effected by estopping State officials from asserting and protecting them in litigation. *Ladnier v. Mollere,* 89 So.2d 301, 307-08 (La. 1956).

In ruling to deprive Louisiana of its constitutionally mandated attorney, the district court exceeded any inherent authority that a Federal district court might possess to regulate the admissions to its own bar and to protect the orderly administration of justice. Consequently, the district court erred in holding that (App., p. 14a) "neither state statutes nor state courts can be dispositive of any dispute over representation of a party in this federal court case."

C. Demolition of the State Constitution

1. Even though the district court disqualified the Attorney General improperly, the court below still had to rely on a delicate interpretation of the State Constitution – which should have been done by the State Court not the federal court below. The most obvious, gargantuan error charging forth from the Federal district court's miscreation of the Louisiana Constitution of 1974 is its reallocation of powers among State executive branch officers as though the Constitution adopted a "cabinet" form of government similar to the executive branch of the state of New Jersey, where the people elect a Governor who appoints all the cabinet officials, including the attorney general. In truth and fact, the redactors of the Louisiana Constitution of 1974 considered and specifically rejected such "cabinet" form of government in favor of the "divided-executive-powers" form of government actually adopted and embodied in the Louisiana Constitution.

Thus the district court plainly erred in purporting to hold that (App., pp. 19a-20a)

> "as a matter of Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation. *Cf. State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So.2d 756 (La. App. 1st Cir. 1983) (upholding the Governor's interpretation of a state statute over the Attorney General's in a dispute between the State and a third-party), *appeal dismissed*, 453 So.2d 557 (La. 1984). This conclusion is based upon the 1974 Louisiana Constitution's clear designation of the Attorney General as a member of the executive branch of the government and, as such, an executive officer inferior to the Governor. *Accord Graddick*, 453 U.S. at 934, 102 S.Ct. at 8."[10]

Such holding assumes, erroneously, that the executive branch adopted by the Louisiana Constitution of 1974 was of the "cabinet" form, common among the original colonies wherein royal governors possessed all of the executive powers, which were unified in him.

Just before and during the Constitutional Convention of 1973 ("CC'73"), then Governor Edwards was in favor of a "cabinet" form of government for Louisiana's executive branch, and the redactors of the 1974 Louisiana Constitution considered several variations of such "cabinet" form of government.

After consideration of a "cabinet" form of government for the executive branch, the CC'73 Committee on the Executive Department and the CC'73 delegates drafted substantially the same

---

[10] The district court's reading of *State ex rel. Guste v. Texaco, Inc.* is strange indeed. That case had nothing to do with a dispute between then Governor Treen and the Attorney General over who was the State's attorney, who would control the advocacy of the State as a separate party in its own name, or what the defense of the State as a separate party in its own name would be. No one in that case doubted or refuted that the Attorney General was the State's attorney and controlled the State's legal position and advocacy therein. Rather, that case was one wherein then Governor Treen, as a separate party himself, "may intervene in any such litigation" and "[a]s an intervenor, the Governor may express his views and take positions contrary to those argued by the attorney general." *Ex parte Weaver*, 570 S.W.2d 675, 684 (Ala. 1990).

"divided-executive-powers" form of government adopted in Minnesota and numerous other states, and ratified by the people of Louisiana. Louisiana's 1974 Constitution is similar to Minnesota's in the following respect:

> "Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers."

State of Minnesota, ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986).

The Louisiana Constitution of 1974 embodies the "divided-executive-powers" form of government wherein each of several executive officers are directly allocated a differentiated segment of executive power. The authority it grants to the Attorney General, as chief legal officer, is excluded from the Governor, as chief executive officer.[11] *Accord, Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987).

---

[11] *State ex rel. Strauss v. Dubuclet,* 25 La. Ann. 161 (1873), does not support the contrary view of Governor's counsel and the Federal district court below, and that non-support is made clear by a review of the record of the appeal in that case in the Louisiana Supreme Court archives (another reason that the Federal district court should have abstained in Civil Action No. 80-3300 and remanded Civil Action No. 90-4109 to let the State court decide this intricate and delicate State law issue). The Governor's authority in that case was Act 21 of the Second session of 1872, which, after placing primary power in the Attorney General, authorized the Governor to appoint counsel to assist the Attorney General or to succeed to him in the event of his inability or of a vacancy in his office, not when representing the State as a separate party, as herein, but rather when representing State ministerial officers, such as then State Treasurer Dubuclet. This gubernatorial power was statutorily predicated in the Act itself on the Governor's then constitutional power to fill a vacancy or inability in the office of Attorney General by appointment under the old "Carpet Bag Constitution" of 1868 (West's LSA-Constitution, Vol. 3, p. 103). As explained in *State ex rel. Baldwin v. Dubuclet,* 27 La. Ann. 29 (1875):

> The Attorney General is the proper officer to represent the State in all her lawsuits, and the statute in question was not intended to deprive him of the control and management of his cases.

(Continued on following page)

2. By holding that the constitutional language "*chief legal officer*" was "without substantive meaning with regard to powers, functions or duties," (App., p. 24a) the district court below directly contravened the Louisiana Supreme Court's

> "cardinal rule of constitutional and statutory construction that such enactments should be construed, where possible, so as to give force and effect to each provision and to render none nugatory."

Central Elec. Co. v. La. Public Serv. Comm., 205 So.2d 389, 391 (La., 1967). In addition,

> [W]here the language of a constitutional provision is clear, . . . we cannot decide constitutional questions on the basis of the drafters' debate, but must rely on the finished product, which is the expression of the voters who adopted the constitution.

Bank of New Orleans and Trust Company v. Seavey, 383 So.2d 354, 356 n.7 (La. 1980). Thus, the district court erred in negating the first paragraph of Art. IV, § 8, by relying on the isolated floor remark of one delegate. Moreover, Delegate Gravel was appointed by the Governor to represent him as an at-large delegate to CC'73 (*RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: JOURNAL OF PROCEEDINGS*, Vol. I, p. 3) and, as such, an opponent of the Attorney General's predominant independence from the Governor.

(Continued from previous page)

> In order to protect the public interest in any particular case where the Attorney General was interested, or was unable to act from death, resignation, absence, or from any other cause, this statute authorizes the Governor to appoint an attorney for such case. It does not authorize him to give consent for the transfer of any particular case and for the trial thereof before the return day, at a different term of the court. The act gives him no personal control of the case whatever. When the condition happens upon which he has authority to supply counsel for the State, the attorney designated by him takes control of such case.

Id., at p. 30. The Governor today no longer has any of those constitutional powers upon which his appointment authority in Act 21 of the Second Session of 1872 was predicated. *See* Article IV, §§ 13, 16, 17, and 18(C), of the Louisiana Constitution of 1974.

The district court also erred in falsely concluding from Delegate Stagg's half-emphasized remark – "without having [*sic*] [the Attorney General] so much authority that he might become more than just the state's chief legal officer" (emphasis deleted) – that the Attorney General is not, nevertheless, fully and exclusively the chief legal officer of the State, with, as Delegate Stagg himself recognized, *"the powers that . . . adhere to that office for him effectively to be able to be the state's chief legal officer [and] to guard the rights of all of the people of the state."* App., p. 23a (emphasis added).

Indeed, the first paragraph of Art. IV, § 8, of the Louisiana Constitution of 1974 came from CC'73's Committee on the Executive Department. If any constitutional history is appropriate for consultation, it is the report on the staff memoranda of that committee. A definitive staff report recommended that the Attorney General have *the greatest independence possible* of all the executive branch officers. *See* Cmte. on Executive Dept., Staff Memo No. 2, March 26, 1973, Exhibit D, *RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS,* Vol. XI, p. 173. The final language of the committee, particularly in what is now the first paragraph of Art. IV, § 8, embodied this recommendation.[12]

3. Significantly, the Alabama Supreme Court recently decided that:

> "The overwhelming authority supports the decision of the Court of Civil Appeals that the attorney general has the power to manage and control all litigation on behalf of the State of Alabama."

Ex Parte Weaver, 570 So.2d 675, 684 (Ala. 1990). This opinion, which was not referred to by the Court below, thoroughly canvasses state authorities and sustains the Attorney General's

---

[12] This case exemplifies the very reason for the Attorney General's independence of the Governor. The Attorney General's duty is to protect and defend the democratic policy choices made by the people as expressed in their Constitution and by their elected representatives in laws, while the Governor, caught up in the struggles of State administration, might well forego the State's constitutional and statutory structures and policies in favor of his own political agenda for mere efficiency or, worse, undemocratic arrogation of power.

authority as chief legal officer of the State to control litigation even against the wishes of the Governor. *Accord, Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987). Even a passing reference to controlling Louisiana Supreme Court decisions shows that the result in Louisiana is the same.

It has always been the law in Louisiana that "it is the duty of the Attorney General and his assistants to prosecute and defend all suits or other legal proceedings to which the state is a party, and to have charge of all legal matters in which the state, as a distinct entity, apart from the other entities or corporate agencies it may create, has an interest." *Saint v. Allen,* 134 So. 246, 248-49 (La. 1931). *Accord, State ex rel Porterie, Attorney General v. Walmsely,* 160 So. 91 (La. 1935):

> "This is a suit by the state, and by the Attorney General, in his official capacity, he being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervenor."

And again:

> "The Attorney General has unquestionably the right to file suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administration office or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution."

State v. Texas Co., 7 So.2d 161, 162 (La. 1942). That the Attorney General is the proper legal representative of the State in judicial proceedings is of venerable lineage in Louisiana, tracing back to François-Xavier Martin's pronouncement for the Louisiana Supreme Court in *State v. Bank of Louisiana,* 5 Mart. (N.S.) 327, 344 (1827): "The authority of the attorney general to prosecute or defend any suit, in which the state is concerned, does not, however, result from mere presumption. It is necessarily implied from the nature of his office, and is expressly given by the act of assembly defining

his duties." This is precisely the duty of the Louisiana Attorney General under Article IV, § 8, of the Louisiana Constitution of 1974, *viz:*

> "As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding. . . . "

See also R.S. 13:5036 and R.S. 49:257(B) (App., p. 36a).

The decision of the District Court below, respectfully, ignores these controlling Louisiana precedents. As Professor Hargrave has noted, speaking of the constitutional authority of the Attorney General under Article IV, § 8: "Subsection (1) in referring to his power to institute, prosecute or intervene in any civil action or proceeding is a continuation of prior provisions *and is unlimited."* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974,* 37 La. L. Rev. 765, 835 (1977) (emphasis added).

D. Propriety of Remedy By Writ of Mandamus

We have demonstrated "the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied," and "the absolute want of authority of the [district court] over the cause." *Ex parte Harding,* 219 U.S. 363, 373, 374 (1911). Mandamus to control improper removal is limited to extraordinary circumstances, but they are surely present here. Removal of *Guste v. Roemer* from the state court system was lawless. Attorney General Guste has been deprived of his constitutional office for faithfully defending Louisiana's Constitution and laws before the district court and at the Bar of this Court. His integrity has been impugned without a hearing for no good reason.[13] "[T]his want of jurisdiction of the inferior court in a summary proceeding to

---

[13] General Guste has publically announced he will not seek reelection after twenty years' service as Louisiana's Attorney General. His term of office expires January 13, 1992, and he desires to leave the Attorney General's office with its constitutional authority intact and his personal record unsullied. Time is plainly of the essence here. *Cf. Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1, 5 (1st Cir. 1984).

remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which [mandamus] is the appropriate remedy." *Ex parte Bradley,* 7 Wall. 364, 377 (1868).

It has been settled law for over a century that "the exceptional rule" of mandamus, *Ex parte Harding,* 219 U.S. at 379, lies to compel a district court to remand a case to state court where the lack of removal jurisdiction is patent. *In re Winn,* 213 U.S. 458, 466-67 (1909), citing, *inter alia, Virginia v. Rives,* 100 U.S. 313 (1880); *Ex parte Wisner,* 203 U.S. 449 (1906). In such a situation,

> "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or an appeal. . . . [W]here, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of a long proceedings, which must go for naught, is not an adequate remedy."

In re Winn, 213 U.S. at 467.

Our research reveals one case directly on point in which mandamus issued requiring the district court to remand to the state tribunal "in order to maintain sound and legally correct relations between the federal courts and the Commonwealth government." *Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1, 5 (1st Cir. 1984). Romero-Barcelo was the Governor of Puerto Rico. He was sued by the President of the Senate of Puerto Rico. The Governor removed the matter to federal court. The district court refused to remand what was essentially an internal political conflict between two coordinate branches of state government. Said the First Circuit: "We conclude that the district court committed jurisdictional error in retaining this case. And, despite [the Governor's] complex, and often heroic, arguments to the contrary, the error is a fairly obvious and serious one." 748 F.2d at 4. And more:

> "[O]f overarching importance, far outlasting the tempests of the present controversies, is the importance of both Commonwealth and federal courts adhering to their proper jurisdiction. Here we have found the district court to have been persuaded to misunderstand the clear meaning of the removal statute as expounded in a long line of Supreme Court (and circuit court) cases, and to remove a case to federal court that did not fall within 28 U.S.C. § 1441. The analysis leading to this result, if allowed to stand, would apply equally to a host of other cases, thus needlessly interfering with Commonwealth legislative, executive, and court proceedings, and undermining basic principles of comity. Those principles suggest that such unauthorized intrusion should be speedily corrected."

Hernandez-Agosto v. Romero-Barcelo, 748 F.2d at 4-5. This Court denied the Governor's application for a stay of mandamus. 469 U.S. at 927.

Guste v. Roemer should be decided the same way.

VII. CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus to the district court below[14] directing it to vacate its October 30, 1990, judgment, opinion and order on the representation of the State and remand the matter to the Civil District Court for the Parish of Orleans, Honorable Revius O. Ortique, Jr., J., whence it came.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

---

[14] Alternatively, this Court should order the Fifth Circuit to vacate the judgment in Civil Action No. 90-4109 and to remand the cause to the district court, with directions to remand the cause to the State Court whence it came.

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant
Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

April 23, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

IN RE: STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

Petitioner,

Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

(Counsel listed on inside cover.)

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana

23 April, 1991

TABLE OF CONTENTS

Page

1. Judgment of United States Court of Appeals for the Fifth Circuit Denying Petition for Writ of Mandamus. 1a

2. Judgment of United States District Court for Eastern District of Louisiana on the Representation of the State. 2a

3. Opinion and Order of United States District Court for Eastern District of Louisiana on the Representation of the State. 4a

4. Judgment of United States District Court for Eastern District of Louisiana on Civil Rights Act Complaint. 31a

5. Order of United States District Court for Eastern District of Louisiana on Civil Rights Act Complaint. 32a

6. Louisiana Constitutional and Statutory Provisions. 34a

   a. Article IV, Louisiana Constitution (1974) . . . 34a

   b. R.S. 13:5036. . . . . 36a

   c. R.S. 49:257(B) 36a

   d. Acts, 1872 (2nd Sess.), No. 21 . . . . . 37a

   e. Article VIII, Subsection 5, 6, 7, 8, of Louisiana Constitution (1974). 41a

7. Affidavit of William J. Guste, Jr., Attorney General, with letters to Governor Roemer. 47a

8. Affidavit of Winston G. Decuir, former Assistant Attorney General. 53a

9. Letter by Kennedy to Judge Schwartz. 57a

TABLE OF CONTENTS – Continued

Page

10. Motion and Order of Enrollment as Additional Counsel..... 59a

11. Letters by Attorney General to Messrs. Kennedy and Levin and Ms. Calobrisi Withdrawing the Authority to be Attorneys for the State..... 64a

12. State Court Petition Removed to Federal Court... 68a

13. Notice of Removal.....84a

14. Memorandum in Opposition to Attorney General's Motion to Remand Case..... 89a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3841

IN RE: STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND THE HONORABLE WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Petitioner.

FILED NOV 28 1990

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

---

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ M. Thompson
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action No. 80-3300 c/w 90-4109
VERSUS	
STATE OF LOUISIANA, ET AL.	Section "A"
	FILED OCT 30 '90

JUDGMENT

Considering the Court's Opinion and Order of October 30, 1990,

IT IS HEREBY ORDERED that John N. Kennedy and Joseph J. Levin Jr. are designated as sole trial counsel representing the State of Louisiana in Civil Action No. 80-3300 and that William J. Guste, Attorney General, is authorized to appear in Civil Action No. 88-3300 solely as an amicus curiae. In the event that any court of appeal should reverse this Order, then John N. Kennedy and Joseph J. Levin Jr. are authorized to appear as amici curiae.

IT IS FURTHER ORDERED that the petition of William J. Guste for declaratory judgment (Civil Action No. 90-4109) is DENIED on the merits at his cost.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:11 p.m.

/s/ Loretta G. Whyte
CLERK OF COURT

Approved as to form:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action No. 80-3300 c/w 90-4109
VERSUS	
STATE OF LOUISIANA, ET AL.	Section "A"

FILED OCT 30 '90

OPINION AND ORDER ON THE REPRESENTATION OF THE STATE

This case is before the Court on the motion of the Attorney General of the State of Louisiana to Designate Counsel for the State and Withdraw Designation of Additional Counsel [Record Document No. (R.Doc.) 517A]. Civil Action No. 90-4109 is also before the Court on the motion of the Attorney General to remand to state court [R.Doc. 9]. The Attorney General seeks to prevent the Governor of the State of Louisiana, acting through Special Counsel John N. Kennedy and associates Joseph J. Levin, Jr. and Carla Calobrisi,[1] from appearing in these proceedings. For the following reasons, the Court DENIES both motions.

I.

In 1974, the United States filed this case, alleging that the State and other defendants were violating Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. In 1981, the

---

[1] On October 16, 1990, the Court granted Carla Calobrisi's own motion to withdraw as co-counsel herein. *See* R.Doc. 554.

parties entered into a Consent Decree in an attempt to resolve the issues before the Court; by December 31, 1987, when the Consent Decree was to expire by its own terms, there was a volley of countering complaints that the State had not lived up to its obligations and that the Consent Decree was fiscally impossible to fully implement.

Because, in the final analysis, the Consent Decree presented an unworkable "band-aid" type solution to the enormous problems in Louisiana public higher education and because no party took any action to extend or substantially amend the decree before its expiration, the litigation returned to "square one," with all issues reopened. *See United States v. Louisiana*, 692 F. Supp. 642, 647-49 (E.D. La. 1988). Following several conferences, it was determined that the Court could resolve the case most expeditiously by addressing liability first and then, if any was found, to proceed with the time-consuming process of fashioning a remedy.

Accordingly, on May 13, 1988, the United States and one of the defendants filed cross-motions for summary judgment on liability. On June 6, 1988, Mr. Guste's Assistant Attorney General Winston DeCuir filed an opposition to that motion. *See* R.Doc. 249. On August 2, 1988, the Court found liability, *see United States v. Louisiana*, 692 F. Supp. at 653-58, and thereafter proceeded to address the issue of remedy. That June 6th paper was the last the Court heard from the Attorney General in any material respect, until after the case at the trial level was effectively concluded, as is detailed more fully below.

In January 1988, a new Governor, Charles E. "Buddy" Roemer III, took office. He had promised, among other

things, a political agenda for reform of higher education. The Attorney General and others apparently briefed him on the lawsuit; to show that the new governor was given notice of the State's defense and substantially agreed with its content, John N. Kennedy, the Governor's Special Counsel, co-signed the State's memorandum in opposition to the United States' summary judgment motion. *See* R.Doc. 249.

At that time, Mr. Kennedy was not enrolled as counsel in the case and did not actually participate in the State's defense nor in the preparation of the memorandum. Matters soon changed, however, when the case entered its remedy phase; the Governor, acting through Mr. Kennedy, took a highly active role in the case, including at almost all conferences in chambers with all counsel who desired to appear. The list of court appearances by Mr. Kennedy forms a stark contrast to the list of purported appearances of the Attorney General's staff, which, as indicated below, amounted to receiving mail and silently attending several status conferences.[2]

---

[2] *Compare* R.Doc. 545, Exh. 1, at 2-6 *with* R.Doc. 547, Exh. A, at 8-16. In addition, the Court's workfiles reflect attendance by attorneys for the Governor and from the Attorney General's office at the following in-chamber conferences:

02/29/88	Mr. Kennedy and Mr. DeCuir
03/16/88	Mr. Mongrue, a member of the Attorney General's staff
03/29/88	Mr. Kennedy and Mr. DeCuir

(Continued on following page)

In November 1988, Joseph J. Levin, Jr. was also retained to represent the State with Mr. Guste's knowledge and explicit consent. Thereafter, on January 18, 1989, Assistant Attorney General DeCuir filed a motion formally requesting this Court to admit John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (Mr. Levin's associate) as additional counsel to represent the State; the Court granted the motion and designated Mr. Kennedy as lead trial attorney, Mr. DeCuir as local attorney, and Mr. Levin and Ms. Calobrisi as additional counsel. *See* R.Doc. 319A.

(Continued from previous page)

08/24/88	Mr. Kennedy and Mr. Walker for the Governor and Mr. DeCuir and Ms. Benoit from the Attorney General's office
11/22/88	Mr. Kennedy and Mr. DeCuir; also, Governor Roemer
12/16/88	Mr. Kennedy, Mr. Levin, and Ms. Calobrisi for the Governor and Mr. Riddick from the Attorney General's office
01/25/89	Mr. Kennedy, Mr. Levin, and Ms. Calobrisi for the Governor and Mr. Riddick from the Attorney General's office

The Governor attended at least one other status conference before the Panel, but the court is unable at this time to recall which one.

Notwithstanding the magnitude of this case and its potential impact on the future of education in Louisiana, Attorney General Guste made no personal appearance after the consent Decree was signed in 1981 until after the proceedings on remedy were essentially over.

Mr. Kennedy's participation in this case, which began in early 1988 and continues to this day, has included the submission of formal filings to the Court, as well as his active participation at hearings, status conferences, depositions, settlement conferences and negotiations, and similar related meetings. After he became involved in the case, Mr. Kennedy, along with Mr. Levin, took the lead in the State's representation, drafting documents, filing motions, conducting discovery, attending hearings, and presenting evidence on behalf of the State, all with the tacit approval of the Attorney General.

The period from August 1988 through July 1989 was the most active period in this litigation. Throughout this period, numerous hearings and court conferences were held, including proceedings before the Special Master on the issue of remedy. Yet the Attorney General's office took what may be generously described as a passive role. Assistant Attorney General DeCuir attended most of the conferences before the Court, but absolutely no filings were received nor was any active part taken by the Attorney General himself or his office. As the Attorney General's own submissions reveal, his office was included on the court's mailing list and received copies of all papers filed by other attorneys. His attempt to classify as appearances before the Court the appearance of his office on mailing lists and certificates of service is, to say the least, misleading to a reader unfamiliar with this case. Such contentions highlight a focal problem in this case: the Attorney General refused to do any more than sit idle, receive mail and then, on the eve of the finality of an order that would have largely completed the case at the

District Court level, complain of the Court's refusal to rule as the Attorney General deemed appropriate.

On July 19, 1989, following innumerable hearings on the issue of remedy and the costly appointment of a Special Master, this Court issued its Opinion and Order on remedy. By then, termination of the case was long overdue, especially considering the time, effort, and taxpayer money expended and the Court's perception of certain parties' power-mongering to the detriment of equal educational opportunity. After the entry of this Remedial Order and just before the expiration of the period to request relief under Rule 59, Attorney General Guste emerged; to the Court's utter surprise and having never indicated that he espoused a position contrary to those he appointed to represent the State, he attempted an effective reversal of the State's position on remedy. Specifically, on August 2, 1989, *after* this Court had issued its Remedial Order and while Governor Roemer was out of the country, Mr. Guste filed a post-trial motion, entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment." *See* R.Doc. 499.

Mr. Guste's challenge to the Remedial Order was both puzzling and surprising to most of the parties.[3] In his "notice to join," he designated Southern's counsel,

---

[3] Southern, however, was not surprised. Not only did Southern know Mr. Guste was joining in its motion, but also Mr. Guste admitted that Senator Jefferson, counsel for Southern, prepared Mr. Guste's Notice to Join and actually filed the notice for Mr. Guste. *See* R.Doc. 545, Exhs. 1-2.

State Senator William J. Jefferson, as counsel to represent the "particular interests of the Attorney General." Previously, throughout the litigation, Southern had been an opponent of the State and the remaining defendants and had closely aligned itself with the plaintiff. Apparently realizing the blatant conflict of interest created by this designation, Mr. Guste moved the very next day to withdraw his appointment of Senator Jefferson and further to "enroll" himself and certain members of his staff as counsel for the State. *See* R.Doc. 508. Notwithstanding this withdrawal, however, he still gave notice that he joined Southern's motion. *See* R.Doc. 507.

The obscurity of Mr. Guste's contention on representation is best illustrated by his belated objection to the creation of a single governing board for public higher education in Louisiana to replace the current four boards. The single board was a principal remedy unceasingly and publicly promoted by the State through Mr. Kennedy and fully supported by the Board of Regents for the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees"), and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"). Given Mr. Guste's contention that he actively participated in the proceedings during this period, and his own admissions that his assistants attended status conferences and his office received copies of all filings, Mr. Guste is certainly charged with knowledge of all submissions to the Court. Yet he made no objections to the actions taken on behalf of the State. Thus, it is difficult to understand Mr. Guste's

current position that he did not consent to all actions taken by Mr. Kennedy before August 2, 1989.[4]

---

[4] The following chronology of events unequivocally refutes the contention and inference that on August 2, 1989, Mr. Guste was suddenly surprised by the Court's adopting the Special Master's recommendation to create a single board.

4/18/89	Special Master's recommended report filed (*including a recommendation for a single board*). R.Doc. 432 (original date for filing objections was May 2, 1989).
5/01/89 to 5/16/89	Various objections to Special Master's report filed: United States: R.Doc. 438. State of Louisiana: R.Doc. 439 (*no objections to single board*) and R.Doc. 445 (response to objections raised by the United States and Southern). Regents: R.Doc. 441. Trustees: R.Doc. 436-437. LSU: R.Doc. 440, R.Doc. 444 (response to objections raised by the United States and Southern). Southern: R.Doc. 443 (objection to single board). Grambling State University Alumni Association (GSUAA): R.Doc. 442.
5/30/89	Final report of Special Master (*including a recommendation for a single board*), R.Doc. 460.
6/01/89	Court ordered objections to Special Master's final report to be filed by June 12, 1989, R.Doc. 462.

(Continued on following page)

Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring this case before the United States Supreme Court. On August 11, 1989, Mr. Guste filed a "Motion for Stay Addressed to Individual Justice." The only other party filing an application for a stay in the Supreme Court was Southern. Simultaneous with his motion for a stay, Mr. Guste filed a Notice of Appeal to the Supreme Court and, on August 16, 1989, asked that Court to remove Mr. Kennedy, Mr. Levin, and

---

(Continued from previous page)

6/12/89 to 6/23/89	Various objections to Special Master's final report filed: United States: R.Doc. 469, 473. State of Louisiana: R.Doc. 475 (*no objection filed to the creation of a single board*). Trustees: R.Doc. 467. LSU: R.Doc. 464-465. Southern: R.Doc. 468 (objection to single board). GSUAA: R.Doc. 466.
6/26/89	Hearing on objections to final report, R.Doc. 480.
7/19/89	Opinion and Order adopting the Special Master's final report, R.Doc. 490.
8/02/89	Attorney General Guste filed his "Notice to Join," R. Doc. 499.

Southern University, with whom the Attorney General is apparently now aligned, suggests as a reason for the Attorney General's lack of participation in these proceedings one that could at least be argued from the record (but one that he in fact does not argue), to wit: he was not concerned about remedy and was only interested in the liability phase of the case.

Ms. Calobrisi as counsel for the State. Thereafter, Mr. Guste filed his Jurisdictional Statement with the Supreme Court, purportedly on behalf of the State. A separate Jurisdictional Statement was filed jointly by the State through Governor Roemer and by Regents, Trustees, and LSU.

II.

Against this background, the Court must to assess who will represent the State's interests in this case. The Court concludes that (1) under both federal statutory and inherent federal judicial authority, it is a federal question for this Court to determine and resolve the right and manner of counsel participation before this Court; (2) due to his active and tacit acquiescence in the Governor's involvement, the Attorney General is judicially estopped from complaining, and he waived any right he might have had to complain, of the Governor's representation of the State in this case; (3) under Louisiana state law, the Governor, not the Attorney General, is the superior representative of the State's interests; and (4) alternatively, the Governor should be permitted to appear and participate as an amicus curiae.

A.

As a federal court of competent jurisdiction over this case under the Civil Rights Act and the Constitution, this Court has both the federal statutory and inherent judicial power to resolve who may be permitted to appear before it and how appearances before it may be conducted. *Compare Frazier v. Heebe*, 482 U.S. 641, 645, 107 S. Ct. 2607,

2611, 96 L.Ed.2d 557 (1987) (citing 28 U.S.C. § 1654) *with Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66, 100 S. Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980)). Thus, neither state statutes nor state courts can be dispositive of any dispute over representation of a party in this federal court case. *See also Western Life Insurance Co. v. Nanney*, 296 F. Supp. 432, 440 (E.D. Tenn. 1969).

Once counsel have been designated and authorized to appear before a court in any proceeding, it is hornbook law, common practice, and has been uniformly held that such court (with any reviewing appellate courts) alone has the right thereafter to determine counsel and to permit substitution or addition of counsel. Specifically, courts are granted broad discretion to determine who shall practice before them in each particular case and to monitor their conduct. This is especially true when the conduct may directly impede the orderly administration of justice. *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619-20 (11th Cir. 1983); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S. Ct. 1133, 51 L.Ed.2d 556 (1977); *see Kleiner*, 751 F.2d at 1209. At times, a defendant's right to counsel "must yield to the higher interest of the effective administration of the courts." *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S. Ct. 86, 62 L.Ed.2d 56 (1979).

If courts did not have this power, attorneys could manipulate the court's docket to suit their tactical advantage. For example, as in this case, on the eve of the finality of judgment, irrespective of all the judicial time and expense previously incurred, a party could, by

removing counsel, attempt to thwart an expeditious resolution of the case.

The Court briefly addresses the Attorney General's conduct in filing on October 9, 1990, a suit in state court seeking to resolve by declaratory judgment the very same issues raised by the Attorney General's own motion before this Court in this very case. The Attorney General's state court suit has now been removed to this Court, assigned Civil Action No. 90-4109, transferred to this Section of Court, and consolidated with this case (Civil Action No. 80-3300). On October 24, 1990, the Attorney General filed a motion to remand, which the Court took under submission on the memoranda without oral argument.[5]

The Attorney General's thinly veiled attempt to deprive this Court of the jurisdiction to determine representation in this case must fail. *See also* 28 U.S.C. § 2283 ("A court of the United States may . . . stay proceedings in a State court . . . where necessary in aid of its jurisdiction). Because federal law and *this* federal court control such issues notwithstanding the Attorney General's contrary suggestion, the Governor's removal of Civil Action No. 90-4109 was proper under 28 U.S.C. § 1441.

---

[5] Concurrent with his motion to remand, the Attorney General sought costs, expenses, attorneys' fees, and imposition of Rule 11 sanctions. The Attorney General's motion for sanctions is baseless and utterly without merit.

B.

The Attorney General's own actions in this case show his acquiescence in the Governor's representation of the State. The Attorney General generally failed to take an active role in the remedy phase of the case. Instead, he permitted the Governor and his lawyers, each of whom Mr. Guste moved into the case as the State's counsel, to conduct the State's defense. Having never objected to the Governor's representation of the State, the Attorney General should not now be allowed in effect to alter the State's position at the eleventh hour, after, as set out heretofore, the case was, for all practical purposes, completed at the trial level.

Having brought the Governor's counsel into the case, Mr. Guste should not then be allowed to replace those attorneys and the Governor, particularly while attempting to change the position of the State by opposing those critical aspects of the Remedial Order that the State had advanced at trial. *See Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); *Mongoose Gin Co. v. United States*, 331 F.2d 483, 484 (5th Cir.) (new allegations, not raised before the trial court, may not be asserted as a basis for reversal of the trial court's judgment), *cert. denied*, 379 U.S. 833, 85 S.Ct. 65, 13 L.Ed.2d 41 (1964); *Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir.) (defendants' failure to contest allegations *"prior to judgment"* prevents them from doing so after judgment is rendered (emphasis in original)), *cert. denied*, 371 U.S. 920, 83 S.Ct. 287, 9 L.Ed. 2d 229 (1962); *see also People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 155-56 172 Cal. Rptr. 478, 479-80, 624 P.2d 1206 (1981) ("no constitutional, statutory or ethical authority" existed to support the Attorney General for "acting adversely to

the position of his statutory clients [the Governor and the state agency]"). The equities against the Attorney General are especially compelling here where he offers no plausible explanation for his tardiness. *See Graddick v. Newman*, 453 U.S. 928, 936, 102 S. Ct. 4, 9, 69 L.Ed. 2d 1025 (1981) (Powell, J., in chambers) (refusing to grant the Alabama Attorney General's request for a stay of a federal district court order, where the governor maintained a different position and the Attorney General "moved with unexplained tardiness"); *see also Williams v. McKeithen*, Civil Action No. 71-98-B, Order (M.D. La. July 20, 1990) (ruling that Governor Roemer, and not Attorney General Guste, is the sole representative of the State in that case, which concerns a long-standing constitutional challenge to the policy and practices of the State's prison system).

Serious inconsistencies in Mr. Guste's arguments further support this conclusion. For example, in pleadings filed with the Supreme Court, Mr. Guste defended his appeal of this Court's Remedial Order and his request for stay of that Order by claiming that he "did not and *could not reasonably expect* that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court]." R.Doc. 545, at 11-12 (quoting Guste's Supersession Motion at 14) (emphasis added). This statement is misleading and could only by excused as a statement from someone who was not familiar with the conferences, the hearings before the Special Master, and the record generally. In 1988, this Court suggested on at least two occasions that a unified governing board was likely to be part of the remedy fashioned in this case. *See United States v. Louisiana*, 692 F. Supp. at 658; R.Doc. 295, Opinion and Order of Nov. 22,

1988. Since then, numerous documents have been filed in this case (and served on Mr. Guste) discussing the single board issue. *See* footnote 4 above. Additionally, overwhelming media attention was given to the proposed abolition of the four boards and the creation of a single board. All of these factors render Mr. Guste's assertions all the more incredible and highlight the propriety of estopping Mr. Guste from complaining of the Governor's representation of the State.

Further, Mr. Guste's explanation to the United States Supreme Court for his belated re-involvement in the case is inconsistent with the explanation he offered to this Court, namely, that he was duty-bound to provide a defense of the State's four board, 70-member governance structure, and the laws creating it. *See* R.Doc. 499, 507. Certainly, to the extent such a duty was present, it has existed since the beginning of the remedy phase of this case, months before Mr. Guste chose to re-enter the case.

This State's Rules of Professional Conduct require candor in an attorney's professional conduct. *See* LOUISIANA RULES OF PROFESSIONAL CONDUCT, RULES 3.3, 4.1, 8.4. The Local Rules of this Court adopt these State rules and provide that this Court may take appropriate action for, among other things, violations of the Louisiana Rules of Professional Conduct. *See* RULES OF DISCIPLINARY ENFORCEMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, RULE II. Rule II could thus arguably serve as the basis for the Court's ordering of Mr. Guste's withdrawal from this case based on a willful violation of such rule. At a minimum, such conduct forms a basis for holding that Mr. Guste is estopped from complaining of the Governor's representation of the State's interests.

Under 28 U.S.C. § 1654, a party in federal court is not permitted "hybrid representation," partly by counsel and partly by himself. *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978). By analogy, a party in federal court is not entitled to divergent counsel. Because the Court on the one hand holds that the Governor's attorneys may continue to represent the State and on the other hand finds that the Attorney General is at odds with the Governor in this case, an additional basis follows for holding that the Attorney General must discontinue to represent the State in this case.

C.

Even if this Court were to find that the Attorney General had not waived his rights herein as a matter of federal law, the Court would conclude that as a matter of Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation. *Cf. State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So.2d 756 (La. App. 1st Cir. 1983) (upholding the Governor's interpretation of a state statute over the Attorney General's in a dispute between the State and a third-party), *appeal dismissed*, 453 So.2d 557 (La. 1984). This conclusion is based upon the 1974 Louisiana Constitution's clear designation of the Attorney General as a member of the executive branch of the government and,

as such, an executive officer inferior to the Governor.[6] *Accord Graddick*, 453 U.S. at 934, 102 S. Ct. at 8.[7]

Then recognition of the Governor's superior position is consistent with Louisiana case law under prior State constitution:

> The Louisiana Supreme Court on frequent occasions has construed Article VII, Section 56 [the Attorney General Clause under the 1921 Constitution], as not conferring an exclusive charge and control of all legal matters in which the state has an interest in favor of the Attorney General.

State of Louisiana ex rel. Guste v. Louisiana Bd. of Highways, 275 So.2d 207, 213 (La. App. 1st Cir. 1973), *aff'd*, 289 So.2d

---

[6] Were the issue of representation in *this* Court solely a question of state law and were the state law not so clear, then *Burford* abstention by this Court might be appropriate. *Cf. also Massachusetts v. Feeney*, 429 U.S. 66, 97 S. Ct. 345, 50 L.Ed.2d 224 (1976) (certifying an similar but unclear issue to the Massachusetts Supreme Judicial Court). But neither condition is true in this case; thus, the Attorney General's reference to *Burford* is misplaced.

[7] In this regard, the instant case is virtually indistinguishable from *Graddick*. Governor Roemer has actively participated in the litigation as the representative of the State of Louisiana and all of its citizens, while the Attorney General has been noticeably inactive until most recently. Additionally, in Alabama, as in Louisiana, the attorney general is the state's chief legal officer under state law. *Compare* Ala. Code § 36-156-21 (1975) *with* La. Const. art. IV, § 8 (1974) *and* La. R.S. 49:21-22; *see also* La. Const. Art. VIII, § 5-7 (1974); La. R.S. 17:1453, 17:1831.

82 (La. 1974);[8] *see also Kemp v. Stanley*, 204 La. 110, 15 So.2d 1, 9 (1943); *Ricks v. Department of State Civil Service*, 200 La. 341, 8 So.2d 9, 59-60 (1942); *State ex rel. Strauss v. Dubuclet*, 25 La. Ann. 161 (1873).

Section 8, pertaining to the Attorney General and naming him "the chief legal officer of the state" was placed in Article IV of the 1974 Louisiana Constitution, on the executive branch of state government, rather than in Article V, on the judicial branch. Article IV, Section 5(A) designates the Governor as "the *chief* executive officer of the state" (emphasis added). Read in context, these sections provide that the Attorney General is an executive officer operating under the Governor. Thus, the Attorney General does not replace the Governor as spokesman for the State whenever the Attorney General attempts to enter a legal proceeding.

The history behind Section 8 confirms that its placement in the executive powers article was purposeful and has meaning. During the constitutional convention debate on the executive branch article, it was suggested

---

[8] The Louisiana Constitution of 1921 contained the following language regarding the powers of the State's Attorney General:

> . . . They, or one of them [the Attorney General and his assistants], shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. . . .

La. Const. art. VII, § 56 (1921).

that even the introductory reference in Article IV, Section 8 to the Department of Justice and the Attorney General should be deleted and that all matters concerning both should be handled in Article V, on the judicial branch of the state government. *See* VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, CONVENTION TRANSCRIPTS [hereinafter "RECORDS-TRANSCRIPTS"), at 625-26, *reproduced in* R.Doc. 545, Exh. 11. The decision not to do that plus the later transfer of the provisions on the power of the Attorney General to the executive branch article, supports the conclusion that the Attorney General is and was meant to be part of the executive branch, which is headed by the Governor. The Attorney General *could* have been made a party of the judiciary, which is independent of the executive branch; in response to that suggestion, however, then-delegate Camille Gravel[9] stated quite clearly:

> No sir. I think that most of us agree that the Attorney General should be in the executive branch of government. In the previous discussion on that . . . , I believe the desire of this convention was to consider the functions of the Attorney General's office under the judiciary article but generally with an understanding that probably those functions would then be placed back in the executive article where we will have created, if this amendment passes, the department of justice within the executive branch.

---

[9] Mr. Gravel had been executive counsel to the former Governor, was a top advisor to the Governor at the time, and worked with the then (and now) Attorney General Guste.

VI RECORDS-TRANSCRIPTS, at 626.

Another member of the Executive Committee, delegate (now U.S. District Judge) Tom Stagg, was even more candid. In alluding to the powers of the Attorney General, Judge Stagg stated that the Executive Committee

> debated what ought to be the powers that would adhere to that office for him effectively to be able to be the state's chief legal officer, to guard the rights of all of the people of the state, *without having [sic] him so much authority that he might become more than just the state's chief legal officer.*

VI RECORDS-TRANSCRIPTS, at 880 (emphasis added).

The phrase "chief legal officer" first appeared in the proposal submitted to the convention by the Committee on the Executive Branch ("Executive Committee"), which was charged with the responsibility of drafting the 1974 constitution's provisions on the executive branch of the Louisiana state government. *See* 1 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, JOURNAL OF PROCEEDINGS [hereinafter "RECORDS-JOURNAL"] 95, *reproduced in* R.Doc. 545, Exh. 9; Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV 765, 834 (1977), *reproduced in* R.Doc. 545, Exh. 10. The Executive Committee's comments to its proposal simply stated without further explanation that "[t]he attorney general is made the state's 'chief legal officer.' " *See* 1 RECORDS-JOURNAL, at 95; *see also* Hargrave, at 934 n.306. The convention's Judiciary Committee also proposed a section to govern the Attorney General; that proposal did not contain the "chief legal officer" language, but instead merely

used the language of the prior constitution. *See* 1 RECORDS-JOURNAL, at 100.

The Executive Committee's proposal concerning the Attorney General reached the convention floor before the proposal of the Judiciary Committee, since the Executive Committee's proposals were part of the overall provisions on the executive branch. However, to avoid protracted debate, part of which involved the proper jurisdiction of the committees, the convention voted to delay consideration of the powers of the Attorney General. *See* VI RECORDS-TRANSCRIPTS, at 624-26; *see also* Hargrave, at 831. Mr. Gravel, a member of the Executive Committee, proposed an amendment that deleted the Executive proposal's reference to the Attorney General's powers and instead simply provided that "[t]here shall be a department of justice, headed by the attorney general who shall be the state's chief legal officer." Explaining his proposal, Mr. Gravel stated:

> [A]ll that this does is to create the department of justice within the executive department and to constitutionally declare that the Attorney General shall be the head of that department and the state's chief legal officer. *All of the matters relating to the functions, powers and duties of the department and of the office of Attorney General will be relegated to future consideration when we consider the judiciary article.*

VI RECORDS-TRANSCRIPTS, at 625 (emphasis added); *see* Hargrave, at 821 n.292.

The reference to "chief legal officer" thus remained, but, as the comment from Mr. Gravel indicates, only as an introductory expression without substantive meaning with regard to powers, functions or duties. The "chief

legal officer" language, which is now the first paragraph of Section 8, merely establishes the department of justices and the fact that its head, *i.e.*, "the chief legal officer of the state," is the Attorney General. The specifics of the Attorney General's powers were to be (and were in fact) handled later when the Judiciary Committee's proposal was considered.

Once the consideration of the powers of the Attorney General was completed upon debate of the Judiciary Committee's proposal, the introductory paragraph in Article IV, Section 8 containing the "chief legal officer" language was followed by two specific categories of powers in two specific paragraphs. The first such paragraph (the second paragraph in Section 8) specifies the constitutional powers granted to the Attorney General and also limits those specified powers. The second such paragraph (the third paragraph in Section 8) leaves to the Legislature (and to other constitutional provisions) the determination of the "other powers" and "other duties" of the office. *See* IX RECORDS-TRANSCRIPTS, at 3377-81; Hargrave, at 831. None of those provisions requires this Court to allow Mr. Guste's position to predominate over the Governor's.

In sum, the state constitution's designation of the Attorney General as "the chief legal officer of the state" must be read in conjunction with its designation of the Governor as "the chief executive officer of the state" with authority over all other executive officers, including the Attorney General.[10] The issue is who establishes policy

---

[10] Article IV, Section 1(A) of the 1974 Constitution was also amended to list the Attorney General as the member of the

(Continued on following page)

for the State in this litigation, not who is the real client, as Mr. Guste would have the Court frame the issue. In sum, the language in the constitution regarding the State's Attorney General confers no substantive or overall supervisory power on that office, as Mr. Guste would claim.

To supersede an attorney for the State, as Mr. Guste has attempted to do before this Court as well as the United States Supreme Court, the Attorney General must establish "cause." La. Const. art. IV, § 8.[11] The drafters of Louisiana's current constitution discussed the meaning of "cause." The records of the constitutional convention are replete with references to the need for some kind of misconduct or failure to act in order to justify the supersession. *See* VI RECORDS-TRANSCRIPTS, at 902-14; *see also* Hargrave, at 835-36. "Cause" in essence means that the attorney "is not fulfilling his duties satisfactorily." Hargrave, at 835; *Plaquemines Parish Commission Council v. Perez*, 379 So.2d 1373, 1377 (La. 1980). There is absolutely

---

(Continued from previous page)

executive branch, although the Attorney General had been omitted at one point. Article IV, Section 1(A) provides that "[t]he executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, and all other executive officers, agencies, and instrumentalities of the state." La. Const. Art. IV, § 1(A).

[11] Section 8 provides in pertinent part that "the attorney general shall have authority . . . for cause, when *authorized by the Court which would have original jurisdiction* and subject to judicial review, . . . to supersede any attorney representing the state in any civil . . . action" (emphasis added).

no basis in the record before the Court for a finding that the Governor's counsel have failed to perform their duties properly or have failed to properly research the law.[12] Rather, their work has been of consistently high caliber. Thus, the Court perceives the local dispute as one of power, to shape policy regarding an appropriate remedy. In summary, the Court must reject as lacking in legal support Mr. Guste's efforts to have his choices predominate over those of the Governor.

D

A federal district co ɔossesses the inherent authority to appoint an amicus curiae to assist the court in its proceedings. *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987); *cf. Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987). The privilege of being heard amicus rests solely within the discretion of the court. *Leigh v. Engle*, 535 F.Supp. 418, 420 (N.D. Ill. 1982); *accord U.S.F.&G. Co. v. Victory Land Co.*, 410 So.2d 359, 361 (La. App. 4th Cir.), *writ denied*, 412 So.2d 1113 (La. 1982); *Parent-Community Alliance for Quality Education, Inc. v. Orleans Parish School Bd.*, 385 So.2d 33, 34 (La. App. 4th Cir.), *writ denied*, 386 So.2d 1379 (La. 1980). Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence. *Michigan*, 116 F.R.D. at 660-61; *cf. Morales*, 820 F.2d at 731. There are no strict prerequisites that must be established

---

[12] Indeed, in his letters of "dismissal"directed to Mr. Kennedy, Mr. Levin, and Ms. Calobrisi, Mr. Guste commended their performance. *See* R.Doc. 545, Exh. 14.

prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court. *Leigh*, 535 F.Supp. at 420; *cf. New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). Absent a statute to the contrary, no distinction is made between the request of a private person for leave to appear amicus and one by an agent of the government. *Leigh*, 535 F. Supp. at 420; *see Braddy v. Southern Bell Telephone & Telegraph Co.*, 458 F.2d 666, 668 (5th Cir. 1972).

That the Governor's continued involvement in this case would prove useful to the Court and the State of Louisiana is an understatement. Throughout this litigation, Governor Roemer has actively and consistently participated as the representative of the State and its citizens. In contrast, the Attorney General has been passive and inconsistent, to the point of being disrespectful of this Court's jurisdiction through his effort to litigate these issues in state court in an attempt to circumvent this Court's inherent power to supervise the appearance of attorneys.

Louisiana's system of public higher education and all of its colleges and universities are at stake. Included in the powers conferred upon the Governor as the State's chief executive officer is the responsibility to appoint the members of the various bodies charged with the management of the State's public higher education system, a duty that is at the very core of this case. *See, e.g.*, La. Const. art. VIII, §§ 5-7; La. R.S. 17:1453, 17:1831-1832, 17:1851-1852, 17:3121-3122. In addition to the duties and powers conferred by the State's constitution and statutes,

the Remedial Order vests the Governor with the responsibility and authority to appoint the voting members of the single state governing board mandated in the Remedial Order. Thus, the Governor clearly possesses substantial legal interests and powers deserving the protection in the remaining stages of this case. Therefore, even if an appellate court were to rule that the Governor through his counsel may not represent the State in this case, this Court would permit the Governor to appear as an amicus curiae.

While the basis for permitting the Attorney General to remain in this case is slim, the Court nonetheless holds that he may participate in this case hereinafter as an amicus curiae, just like GSUAA.

III.

For these reasons, the Court holds that John N. Kennedy and Joseph J. Levin Jr. are designated the State's sole attorneys in this case and that the Attorney General may participate as an amicus curiae only.

The issuance of this Order necessarily determines the entirety of the Attorney General's declaratory judgment suit; thus, the Court now DENIES all relief in that suit. Nothing herein, however, shall be construed to prevent the Attorney General from litigating his right to appear as a representative of the State in a matter not involving these proceedings.[13]

---

[13] Although the Attorney General uses broad language in his supporting memoranda, his complaint in his Petition for

(Continued on following page)

The Clerk of Court is directed to enter a Judgment in accordance herewith.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:00 P.M.

/s/ Charles Schwartz. Jr.
UNITED STATES DISTRICT JUDGE

(Continued from previous page)

Declaratory Judgment and Injunction Relief is the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi *solely* in connection with this case. To the extent the Attorney General would seek to adjudicate the issue of representation in future possible actions, his request would not yet present a justiciable case or controversy; thus, to any such extent, his declaratory judgment suit would be dismissed as premature.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action
VERSUS	No. 80-3300
STATE OF LOUISIANA, ET AL.,	Section "A"
	FILED OCT 30 '90

JUDGMENT

Considering the Court's Order of October 30, 1990,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that there is judgment against plaintiff (the United States of America) and in favor of all the defendants, dismissing the plaintiff's complaint with prejudice. Each party shall bear its own costs and attorney's fees.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:40 p.m.

/s/ Loretta G. Whyte
CLERK OF THE COURT

Approved as to form:

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action
VERSUS	No. 80-3300
STATE OF LOUISIANA, ET AL.,	Section "A"
	FILED OCT 30 '90

ORDER

Notwithstanding factual distinctions between Louisiana's and Mississippi's public higher education systems, *see, e.g., United States v. Louisiana*, 692 F. Supp. 642, 656 n.69 (E.D. La. 1988), and respectfully disagreeing with the majority's conclusion in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), this Court nonetheless finds that *Ayers* is both binding and controlling in this cause and that, under *Ayers*, there are no disputed material facts left for this Court to resolve.[1] Accordingly, the Court VACATES its Order of August 2, 1988,[2] DENIES summary

---

[1] This conclusion is based on the Court's familiarity with every aspect of this litigation including the affidavits, testimony, and depositions taken in connection with all proceedings herein including such in motions for summary judgment, proceedings and testimony before the Special Master, all representations made at all hearings, and all of the parties' submissions to the Court.

[2] This Court construes the Fifth Circuit's remand order to permit this vacation, whether as reconsideration of an interlocutory order or as appropriate relief under F.R.Civ.P. 60(b)(6) to a final order. *Cf. Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 & n.3 (5th Cir. 1976).

judgment in favor of the United States, GRANTS summary judgment in favor of all defendants, and DIRECTS the Clerk to enter herewith final judgment in accordance with this Order.[3] Each party shall bear its own costs and attorney's fees.

Had this Court a clean, or at least pre-*Ayers* (en banc), slate, the Court would not vacate its Order herein of August 2, 1988 and would enter a remedial order in the form of "Revised Exhibit A" attached to the Order and Reasons issued this date. Thus, if the judgment entered herewith is reversed on appeal, that proposed remedial order should be considered the Order of this Court without the necessity of a remand.

New Orleans, Louisiana, this 30th day of October, 1990, at 2:29 p.m.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

---

[3] As this Court reads the *Ayers* opinion: absent a discriminatory intent, different mission designations may limit the program and scope of various universities. Thus, a State is not required to fund all educational institutions at the same level or to fund any particular one at any particular level. Therefore there is no basis whatsoever for this Court to retain any further jurisdiction. of this case.

ARTICLE IV. EXECUTIVE BRANCH

§ 1. Composition; Number of Departments; Reorganization

Section 1. **(A) Composition**. The executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, commissioner of elections, and all other executive offices, agencies, and instrumentalities of the state.

§ 3. Election; Term

Section 3. **(A) Election.** Except as provided in Section 20 of this Article, the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, and commissioner of elections each shall be elected for a term of four years by the electors of the state at the time and place of voting for members of the legislature. The term of each such official shall begin at noon on the second Monday in January next following the election.

(B) Limitation on Governor. A person who has served as governor for more than one and one-half terms in two consecutive terms shall not be elected governor for the succeeding term.

§ 5. Governor; Powers and Duties

Section 5. **(A) Executive Authority.** The governor shall be the chief executive officer of the state. He shall

faithfully support the constitution and laws of the state and of the United States shall see that the laws are faithfully executed.

(H) Appointments.

(1) The governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.

(I) Removal Power. The governor may remove from office a person he appoints, except a person appointed for a term fixed by this constitution or by law.

§ 8. Attorney General; Powers and Duties

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall selected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to service at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute,

prosecute, or intervene in any criminal action or proceeding, or (b) to supersede and attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

R.S. 13:5036. Suits for protection of state's interests and rights; institution and prosecution by attorney general; costs; bond

The attorney general may institute and prosecute any and all suits he may deem necessary for the protection of the interests and rights of the state. No court of this state, nor officer thereof, shall demand of the state, or the attorney general, any security for costs, or any advance costs; but all costs for which the state may become liable shall be paid by the attorney general out of the proper appropriation therefor. In any and all cases where bond is required by law in legal proceedings, the state and the attorney general shall be dispensed from giving such bond.

R.S. 49:257(B). Legal representation of certain state agencies

* * *

B. Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in

any action or proceeding in which the constitutionality of a state statute or of a resolution of the Legislature is challenged or assailed.

* * *

No. 21.]

AN ACT

To limit and define the duties and powers, fees and emoluments of the Auditor of Public Accounts and other ministerial officers of the State, and to prohibit them from instituting or defending actions, suits, writs, or other process for or against the State, and from employing counsel and incurring costs of court, attorneys' fees and other unnecessary expenses to the State, and to define the duties and powers of the Governor, the Attorney General, the district attorneys and the courts of the State in certain cases.

WHEREAS, It appears that the Auditor of Public Accounts and other ministerial officers have, without authority of law, incurred great and unnecessary expenses to the State, and impaired the credit of the State by various and unnecessary litigation; and

Whereas, The Constitution and laws have made proper and sufficient provision for the institution, maintenance and defense in the courts of the State of all actions, suits, writs, or other legal process instituted or to be instituted in behalf of or against the State, or in behalf of or against any of the officers of the State in their respective official capacities; and

Whereas, The organic law and sound public policy require and designate that the powers and duties of the co-ordinate branches of the State government should be maintained distinct and separate, the executive, the legislative, and the judiciary, as set forth in the Constitution; and

Whereas, The several district attorneys, in and for their respective districts, are the proper officers designated by the Constitution as counsel for the State and for officers of the State in their official capacities; and

Whereas, The Attorney General is the chief law officer of the State, and the constitutional adviser and counsel of the Auditor of Public Accounts, the State Treasurer and other ministerial officers of the State, and authorized and required to institute, defend and control all suits, writs, actions and other legal process in behalf of or against such ministerial officers, in their respective official capacities; and

Whereas, The Attorney General and the district attorneys are paid by the State large salaries for the performance of such duties as pertain to their respective offices, and the public have a right to their services in return, and, together with the judiciary, they have the exclusive right to determine and pass upon all constitutional and legal questions arising out of any contract or proceedings or otherwise, wherein the State may be interested, directly or indirectly, or wherein any public officer may be called upon to act in his official capacity; and

Whereas, The Governor of the State, as the chief executive, charged to see the laws faithfully executed, has the right, in case of the absence, death, resignation or

inability to act in any particular case of the Attorney General, or proper district attorney, or where either of them may be directly interested, a right to designate an attorney for, such case to act in behalf of the State, for the protection of the public interest.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That hereafter it shall not be lawful for the Auditor of Public Accounts, the State Treasurer, or other ministerial officers of the State, to be or appear in any court of the State, either in person or by private counsel, to institute, maintain, defend, prosecute, or in any manner interfere, or attempt to control any suit, writ, or other legal process (except criminal proceedings) which may be brought against him in his official capacity, or in which the State may be interested, directly or indirectly, or be in any wise a party; but in all such cases the papers shall be served, if the action be instituted in the parish of Orleans, on the Attorney General, and if in any other parish, on the proper district attorney or district attorney *pro tempore,* and such officer shall thereupon have sole charge of the conduct of such action; *provided,* that the Governor or the Attorney General may, in any case of necessity, designate an attorney-at-law to assist the attorney of State, or in case of his absence or inability to act, or if he be unwilling or interested, to take charge of such case, with power to act. And it shall be the duty of the Auditor of Public Accounts, the State Treasurer and other ministerial officers of the State, or persons charged with the execution of any State contract, or act enjoined by law, or pertaining to the duties of his station, on application, or if he have doubt as to the proper course to be pursued, to

refer the matter, with all information in his possession, to the Attorney General of the State.

SEC. 2. *Be it further enacted, etc.*, That hereafter it shall not be lawful for any court of the State to entertain, or maintain, or recognize any action, suit, writ, or other legal process, nor any pleading in any case wherein the Auditor of Public Accounts, the State Treasurer, or any other ministerial officer, appear as a party to the record, either in person or by private counsel, but all such proceedings shall be refused or dismissed (either *ex officio* or on motion) as in case of non-suit, without prejudice to the rights of parties interested; *provided*, that in every such case the officer thus unlawfully appearing shall be condemned to pay the costs of suit therein; and *provided further*, that notice of such dismissal shall be served on the Attorney General, or proper district attorney, who may, on motion, reinstate and maintain such action as it stood at the moment of dismissal, without prejudice to the rights of parties interested, if he deem it expedient so to do.

SEC. 3. *Be it further enacted, etc.*, That hereafter it shall be unlawful for the Auditor of Public Accounts to demand, receive or accept any other fees, rewards, compensation or salary than the salary of five thousand dollars per annum allowed by the Constitution, and such amount for clerk hire, contingent expenses and office rent as may be allowed by law, not exceeding in the aggregate twenty thousand dollars per annum; *provided*, that nothing in this act shall be construed to relieve the Auditor of Public Accounts from the performance of such duties, within his office, as are now required by law for the public convenience.

SEC. 4. *Be it further enacted, etc.*, That in every case in which process issues from any court against the Auditor of Public Accounts, or any other ministerial officer of the State, service shall also be made on such officer, and he shall be amenable, as heretofore, to all process of court, and subject to punishment for any violation of any order, writ or judgment, as now provided by law, and such further punishment as the court may deem necessary to maintain its jurisdiction and enforce its mandates.

SEC. 5. *Be it further enacted, etc.*, That this act shall take effect from and after its passage, and all laws or parts of laws conflicting herewith are hereby repealed.

(Signed) O. H. BREWSTER,
Speaker of the House of Representatives.
(Signed) P. B. S. PINCHBACK,
Lieutenant Governor and President of the Senate.
Approved March 6, 1872.
(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.
A true copy:
F. J. HERRON,
Secretary of State.

ARTICLE VIII. EDUCATION

Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may

be afforded an equal opportunity to develop to his full potential.

* * *

§ 5. Board of Regents

Section 5. **(A) Creation; Functions.** The Board of Regents is created as a body corporate. It shall plan, coordinate, and have budgetary responsibility for all public higher education and shall have other powers, duties, and responsibilities provided in this Section or by law.

(B) Membership; Terms. The board shall consist of fifteen electors appointed by the governor, with consent of the Senate, for overlapping terms of six years, following initial terms which shall be fixed by law. At least one member, but no more than two members, shall be appointed from each congressional district.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

(D) Powers. The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of higher education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3) To study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education.

(5) To require that every higher education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of higher education in the state. It shall recommend priorities for capital construction and improvements.

(E) Powers Not Vested. Powers of management over public institutions of higher education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State

University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other such board created pursuant to this Article, as to the institutions under the control of each.

§ 6. Board of Trustees for State Colleges and Universities

Section 6. **(A) Certain; Functions.** The Board of Trustees for State Colleges and Universities is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College

Section 7. **(A) Creation; Powers.** The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

(B) Membership; Terms. Each board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 8. Boards; Membership; Compensation

Section 8. **(A) Dual Membership.** No person shall be eligible to serve simultaneously on more than one board created by or pursuant to this Article.

(B) Student membership. The legislature may provide for the membership of one student on the boards

created by Sections 5, 6 and 7 of this Article. The term of a student member shall not exceed one year, and no student member shall be eligible to succeed himself. A student member shall have all of the privileges and rights of other board members.

(C) Compensation. A member of a board created by or pursuant to this Article shall serve without pay, but per diem and expenses may be provided by law.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF LOUISIANA, *et al.*, Defendants.	Civil Action No. 80-3300 Section "A"

AFFIDAVIT

I, William J. Guste, Jr., on oath depose and say that I am the duly elected Attorney General of the State of Louisiana and as such, I am the chief legal officer of the State.

I have represented the State of Louisiana in the higher education desegregation case herein since the complaint was filed against Louisiana by the United States Government in 1974.

On January 18, 1989, through an assistant, I filed a motion to enroll John Kennedy, the Governor's Special Counsel, together with two counsel contracted for by the Governor's Office, Joseph Levin and Carla Calobrisi, as additional counsel for the State of Louisiana and designated Kennedy as "Trial Attorney."

I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to allow him to tender whatever remedial ideas he had to the Court. Throughout the remedial stage of these proceedings, however, it was my firm belief, and it remains my firm

belief, that it is beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure which is protected by Louisiana's Constitution.

Whatever the Governor's policy position, it is my sworn duty as Attorney General to defend Louisiana's Constitutional and statutory provisions against judicial orders that impinge upon Louisiana's sovereignty. I intend to do so.

It was not my intention in permitting the enrollment of the Governor's special counsel to waive my professional legal judgment or my constitutional duty as Attorney General of Louisiana regarding Louisiana's multiple-board system of higher education. Nor have I ever given consent to the abolition of our State's multiple-board system by federal judicial decree, as does the Governor's special counsel.

The minute entry of the District Court of August 1, 1989, threw into doubt Southern University's standing to challenge this Court's decision on State Constitutional and statutory grounds. For this reason, I immediately filed a Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel of August 11, 1989, so as to make it perfectly clear that my office, and my office alone, would manage the State's appeal of the District Court's orders herein.

Thereafter, I filed an appeal to both the United States Supreme Court and the Fifth Circuit, and I filed an application for a stay in the Supreme Court of the United States, all of which was opposed by the Governor's special counsel, who moved to dismiss the State's appeal, *ex*

rel. Guste, in the Supreme Court and who opposed the State's application, *ex rel.* Guste, for a stay order, which was granted by the Supreme Court on August 18, 1989.

I have personally initiated a meeting with Governor Roemer in his office explaining my position regarding my duties and my actions in this matter. I have explained to him that I have no objection to the Governor appearing as *amicus curiae* on appeal of the District Court's orders so as to allow him to express his policy in support of the District Court's judgment on remedy. I have also told him that I have my constitutional responsibilities under my oath of office as Attorney General of Louisiana. In fact, I proposed such an *amicus* procedure in a spirit of compromise by letters to Governor Roemer dated September 29, 1989 and December 21, 1989 (copies attached hereto as Exhibit B), and in a personal meeting with the Governor.

This statement by me has been prepared at my direction. It has been read to me by my Administrative Assistant, Stella L. Lomando, and I have affirmed and sworn by telephone to Dale C. Wilks, Notary Public, that it is true and correct, and I have authorized my Administrative Assistant, Stella L. Lomando, to sign my name hereto.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 26th day of October, 1990, at New Orleans, Louisiana.

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL OF LOUISIANA

/s/ Dale C. Wilks
NOTARY PUBLIC

APPENDIX A

State of Louisiana
DEPARTMENT OF JUSTICE
Baton Rouge
70804
September 29, 1989

Honorable Buddy Roemer
Governor, State of Louisiana
State Capitol
Baton Rouge, Louisiana 70804

Dear Governor Roemer:

It is vital that Louisiana present as united a front as possible in the higher education desegregation case now before the Supreme Court. I, therefore, want to avoid what would be an unseemly struggle between your office and mine regarding representation of the State's interests before the Supreme Court.

It would be appreciated very much if you will meet with me as soon as possible (Tuesday coming). I want to work out a mutually satisfactory arrangement regarding representation of the State's positions, including yours, before the Supreme Court.

It is my hope that we can reach an agreement that is satisfactory to both of us. If this were possible, I could withdraw the motion to supersede your counsel that I have filed in the Supreme Court. The issues before the Court in the desegregation case are too important in their own right to be clouded by a jurisdictional fight between our offices at the bar of the Supreme Court.

Sincerely,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.

WJG, Jr-sl

cc: John N. Kennedy
P.J. Mills

EXHIBIT "B"

(SEAL)

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE 70804 Telephone: 504-342-7013

December 21, 1989

Charles "Buddy" Roemer
Governor
State of Louisiana
4th Floor
State Capitol Building
Baton, Rouge, Louisiana 70804

RE: State of Louisiana, ex rel William J. Guste, Jr., Attorney General for the State of Louisiana vs. United States of America
#89-556

Dear Governor Roemer:

The Supreme Court will have a conference on Louisiana's higher education desegregation case on Friday, January 5, 1990.

I want to repeat my suggestion that it is vital that Louisiana present as united a front in the Supreme Court as possible.

As I mentioned before at our meeting in your office I would be happy to withdraw my motion to supercede counsel for the State of Louisiana conditioned upon your willingness to appear in this case as amicus curiae.

You mentioned when we met that you wanted to think this matter over. I hope that you agree with my suggestion at this time. May I please hear from you as soon as possible as time is of the essence.

Best holiday wishes,

WILLIAM J. GUSTE, JR.
Attorney General

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

AFFIDAVIT

BEFORE ME, the undersigned notary public, personally came and appeared Winston G. DeCuir who after being duly sworn did depose and say that, from October 1975, through January of 1989 he was employed by the Attorney General's office as an attorney in various capacities, particularly during the years 1987, 1988, and 1989 he was an Assistant Attorney General and chief of the education section of the Louisiana Department of Justice. As such affiant was in charge of organizing the State's legal effort in all areas of education and particularly in the area of higher education. Affiant further deposed that he is familiar with the litigation entitled *United States of America v. State of Louisiana* Civil Action No. 80-3300, United States District Court, Eastern District of Louisiana; and that during the period between 1987, and January of 1989 he was enrolled as attorney for the State of Louisiana in said litigation; during that period he attended and participated in all status conferences held before the court, and the various negotiations sessions between the United States of America and the various State defendants. Pursuant to the orders of the Court and the motions of the parties, Affiant further deposed that on behalf of the State of Louisiana and the Louisiana Board of Elementary and Secondary Education he did prepare and file with the court documents and memorandum opposing the Motion for Summary Judgment Board of Regents. Said memoranda and documents were prepared solely and exclusively under Affiant's direction within the office of the Attorney General by Affiant and members of the staff of

the Louisiana Attorney General. Affiant further deposed and said that John N. Kennedy played no part in the preparation of these documents but was allowed to sign the documents as special counsel to the Governor of Louisiana as an accommodation. At all times during the proceedings the interest of Louisiana and Louisiana Board of Elementary and Secondary Education was represented by the Louisiana Attorney General's office.

Sometime after Charles E. "Buddy" Roemer, III, was elected Governor; but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation.

Some months after the entry of the court's Order and Reasons for Summary Judgment, in August of 1988, Mr. John Kennedy acting on behalf of the Governor of the State of Louisiana, requested that Affiant approach the Attorney General to allow Kennedy and other counsel to enroll as additional counsel in these proceedings in order that they may appear and present the position of the Governor on the issue of liability filed by the United States of America and supporting the Motion for Summary Judgment filed by the Louisiana Board of Regents. Said memoranda and documents were prepared solely and exclusively under Affiant's direction within the office of the Attorney General by Affiant and members of the staff of the Louisiana Attorney General. Affiant further

deposed and said that John N. Kennedy played no part in the preparation of these documents but was allowed to sign the documents as special counsel to the Governor of Louisiana as an accommodation. At all times during the proceedings the interest of Louisiana and Louisiana Board of Elementary and Secondary Education was represented by the Louisiana Attorney General's office.

Sometime after Charles E. "Buddy" Roemer, III, was elected Governor; but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation.

Some months after the entry of the court's Order and Reasons for Summary Judgment, in August of 1988, Mr. John Kennedy acting on behalf of the Governor of the State of Louisiana, requested that Affiant approach the Attorney General to allow Kennedy and other counsel to enroll as additional counsel in these proceedings in order that they may appear and present the position of the Governor in the remedy phase of this litigation. This request was consented to in December of 1988 and a Motion to Enroll Additional Counsel on Behalf of the State was filed in January of 1989 by the Attorney General's office. At all stages of the litigation the office of the Attorney General represented the State of Louisiana and was active in all phases of said litigation with the single

exception that the Attorney General did not offer a separate State plan for higher education during the remedial phase of this matter.

The Affiant further deposed that prior to his entry into this litigation in 1987 the State of Louisiana was represented by Assistant Attorney Generals Kendall Vick and Paul Falitta.

/s/ Winston DeCuir
Winston DeCuir

Sworn to and subscribed before me this 8th day of October, 1990.

/s/ David G. Sanders
NOTARY PUBLIC

BUDDY ROEMER

March 9, 1988

The Honorable Charles Schwartz
Judge, United States District Court
for the Eastern District of Louisiana
Room C-255 (Filed MAR 10 1988)
500 Camp Street
New Orleans, LA 70130

Re: *United States of America v. State of Louisiana, et al.*, Civil Action Number 80-3300 "A", United States District Court for the Eastern District of Louisiana.

Dear Judge Schwartz:

Regarding the captioned matter, I represent Governor-Elect Buddy Roemer, Governor-Elect of the State of Louisiana.

In response to your minute entry of March 1, 1988, and pursuant to my telephone conversation of March 8 with Ms. Monachino, your law clerk, I ask that my name be added to your mailing list for this case. My address is as follows:

John N. Kennedy
Special Counsel to the Governor
Office of the Governor
State of Louisiana
Post Office Box 94004
Baton Rouge, Louisiana 70804
Telephone: (504) 342-7015

Thank you very much for your time and assistance in this matter.

Sincerely,

/s/ John N. Kennedy
John N. Kennedy
Legal Counsel
to the Governor-Elect

JNK:bj

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS CIVIL ACTION NO. 80-3300A
STATE OF LOUISIANA, ET AL

MOTION TO ENROLL ADDITIONAL COUNSEL OF RECORD

Now comes Winston G. DeCuir, attorney for the State of Louisiana, who moves the court to enroll the following persons as additional counsel of record for the State of Louisiana in the above captioned matter:

1.

The State moves that John N. Kennedy, Special Counsel to the Governor, Office of the Governor, State Capitol, 4th Floor, Post Office Box 94004, Baton Rouge, Louisiana 70804; Bar Number 7782 be enrolled as counsel of record. Mr. Kennedy is a member of this court and eligible to be enrolled as additional counsel under the rules of this court;

2.

The State moves that Joseph J. Levin, Jr. Attorney at Law, 2000 M. Street N.W., Washington, D.C., 20036-3307, Washington, D.C. Bar Number 147249 be enrolled as additional counsel of record for the State of Louisiana; attached hereto and made a part hereof are affidavits of Joseph J. Levin, Jr. indicating that he is a member of the bar of the State of Alabama and the District of Columbia

in good standing and that no disciplinary or criminal proceedings have been instituted against him. Additionally an affidavit of good standing from the United States District Court for the District of Columbia is attached hereto as required by Rule 21.5 of this court.

3.

The State moves that Carla Calobrisi, Attorney at Law, 2000 M Street, N.W., Washington, D.C., 20036-3307, Washington, D.C. Bar Number 398021 be enrolled as additional counsel of record for the State of Louisiana; attached hereto and made a part hereof is the affidavit of Carla Calobrisi, indicating that she is a member in good standing of the bar of the State of Virginia and the District of Columbia and that no criminal or disciplinary proceedings are pending against her. Additionally attached hereto is the affidavit of good standing of Carla Calobrisi executed by the Deputy Clerk for the United States District Court for the District of Columbia as required by Rule 21.5 of this Court.

4.

The State further moves that John N. Kennedy and Joseph Levin, Jr., be designated trial attorneys for the State of Louisiana pursuant to Rule 2.3 and that Winston G. DeCuir be designated resident attorney.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Winston G. DeCuir
WINSTON G. DeCUIR
Assistant Attorney General

LOUISIANA DEPARTMENT
OF JUSTICE
Post Office Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
STATE OF LOUISIANA, ET AL

CIVIL ACTION NO. 80-3300

ORDER

Considering the above and foregoing motion.

IT IS ORDERED that John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi be enrolled as additional counsel of record for the State of Louisiana,

IT IS FURTHER ORDERED that John N. Kennedy be designated as trial attorney for the State of Louisiana and that Winston G. DeCuir remain designated as local attorney for the State of Louisiana.

New Orleans, Louisiana, this 20th day of January, 1989.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the following counsel by depositing same in U.S. Mails, postage prepaid, addressed as follows:

William Jefferson, Esq.
Jefferson, Brian and Gray
650 Poydras Street
Suite 1850
New Orleans, Louisiana 70130

Robert Kutcher, Esq.
Bronfin, Heller, Steinberg
and Berins
650 Poydras Street
Suite 2500
New Orleans, Louisiana 70130

W.S. McKenzie, Esq.
Taylor, Porter, Brooks & Phillips
451 Florida Blvd.
Baton Rouge, Louisiana 70801

Thomas N. Todd, Esq.
1 North LaSalle Street
Suite 2250
Chicago, Illinois 60602

State of Louisiana
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

(Seal)
WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

August 11, 1989

Mr. John N. Kennedy
Special Counsel to the Governor
c-o Governor's Office
State Capitol
Baton Rouge, Louisiana 70804

Re: United States of America v. Louisiana
United States District Court
for the Eastern District of Louisiana
Civil Action #80-3300

Dear John:

You have done an outstanding job in assisting in the representation of the State of Louisiana in this most important suit involving higher education.

You may be sure that this work is appreciated by everyone.

As you know, in the latter part of last year, you signed on our brief as Special Counsel to the Governor, and I filed motions having you entered as Counsel of Record in the case. On your request, we also filed motions entering as Counsel of Record Joseph J. Levin and Carla Calobrisi.

We have reached a point in the case where it is important that we do not have confusion with regard to the representation of the State of Louisiana. I am most happy to have you continue as Attorney of Record in these proceedings with the understanding that you may file such pleadings as you or Mr. Levin or Ms. Calobrisi see fit on behalf of the Governor as amicus or otherwise. It should be noted that the Governor is not a party to the suit.

However, the Attorney General and only the Attorney General will file pleadings on behalf of the State of Louisiana as its official legal spokesman.

John, we want to work together as much as possible on this, and I look forward to doing so. This case is of monumental importance to the State and its people, and I know that everything you have done has been done by you with the intent to do what is best for the State.

As I see my duty, it is to support the Constitution of the State and to defend the State against liability in this case until that Constitution has been changed by a judgment of the U.S. Supreme Court or by a vote of the people. I also think it important to prevent the unnecessary merger of LSU and Southern University Law Schools.

I hope that understanding these parameters, we may continue to work together in the best interest of the State.

Yours very truly,

/s/ Billy
WILLIAM J. GUSTE, JR.
Attorney General

WJG, Jr-sl
cc: Honorable Buddy Roemer
Mr. Joseph J. Levin
Ms. Carla Calobrisi

State of Louisiana
DEPARTMENT OF JUSTICE

(Seal) 7TH FLOOR
WILLIAM J. GUSTE. JR. 9-9-4 LOYOLA-BUILDING
ATTORNEY GENERAL NEW ORLEANS, 70112-8098

August 11, 1989

Mr. Joseph J. Levin
Ms. Carla Calobrisi
200 M Street, N.W.
Washington, D.C. 20036-3307

Re: United States of America v. Louisiana
United States District Court for the
Eastern District of Louisiana
Civil Action #80-3300

Dear Mr. Levin and Ms. Calobrisi:

Please see the attached letter which I have addressed this day to John Kennedy, Special Counsel to the Governor.

You may be sure that the State is grateful to you for the role you have played in the above referred to suit.

As I pointed out in my letter to Mr. Kennedy, it is imperative that we not have confusion in who represents the State of Louisiana at this point.

I am most happy to have you continue as Attorneys of Record in these proceedings with the understanding that you may file such pleadings as you see fit on behalf of the Governor as amicus or otherwise. It should be noted that the Governor is not a party to the suit.

However, the Attorney General and only the Attorney General will file pleadings on behalf of the State of Louisiana as its official legal spokesman.

Yours very truly,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.

WJG, Jr/sl

Enclosure

STATE OF LOUISIANA, *EX REL*, WILLIAM J. GUSTE, JR., ATTORNEY GENERAL	CIVIL DISTRICT COURT
VERSUS	PARISH OF ORLEANS
CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI	STATE OF LOUISIANA
DOCKET NO:_____	FILED:_____

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

NOW INTO COURT comes plaintiff, the sovereign STATE OF LOUISIANA, through its chief legal officer, Attorney General WILLIAM J. GUSTE, JR., who respectfully represents:

1.

Made defendants herein are:

(1) the Honorable CHARLES E. "BUDDY" ROEMER, III, Governor of the State of Louisiana, whose domicile is located in the Parish of East Baton Rouge;

(2) JOHN N. KENNEDY, Special Counsel to the Governor, whose domicile is located in the Parish of Orleans;

(3) JOSEPH LEVIN, JR., a non-resident attorney at law employed by ROEMER, who may be served at the Office of the Governor, Louisiana State Capitol, Fourth Flour, Baton Rouge, Louisiana.

(4) CARLA CALOBRISI, a non-resident attorney at law employed by ROEMER, who may also be served at the Office of the Governor at the Louisiana State Capitol in Baton Rouge, Louisiana.

2.

Plaintiff, STATE OF LOUISIANA, has an inherent and sovereign right and interest in the legal enforcement of its Constitution.

3.

In particular, the State of Louisiana has an inherent and sovereign right and interest in the immutability of the constitutional polity for the administration and management of colleges and universities, adopted by the people of the State of Louisiana in 1974 in Article VIII, Sec. 5, 6 and 7 of the Louisiana Constitution (1974).

4.

The Attorney General is sworn by oath of office to uphold and protect from abrogation the popular sovereignty manifest and embodied in the Louisiana Constitution of 1974.

5.

This duty to preserve and protect the constitutional regime adopted by the people extends to all legal affairs in which the Constitution and general state law invest the

State with a right and interest, including all litigation in the state and federal courts.

6.

The fundamental duty of the Attorney General to uphold and enforce the Constitution and laws of the State of Louisiana is constitutionally enabled by the official status and powers incidental thereto granted by La. Const. Art. IV, Sec. 8 (1974), which provides in pertinent part:

> "There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. . . .
>
> As necessary for the assertion of protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supercede any attorney representing the state in any civil or criminal action.
>
> The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law."

"Chief legal officer," a title not provided by the 1921 Constitution but added to the 1974 Constitution, nominates the Attorney General as the constitutional officer with ultimate authority over the legal affairs of the State,

and over the attorneys representing the State in the conduct of those affairs.

7.

Attorneys who are not authorized by the Constitution or statutes of the State to legally represent the State in civil actions and proceedings are subject to the plenary authority of its chief legal officer. Accordingly, under Art. IV, Sec. 8, the Attorney General has the unconditional and plenary power to remove or rescind the legal authority to represent the State from any attorney employed by the State, who does not enjoy an independent right to do so granted expressly by the Constitution.

8.

La. Const. Art. IV, Sec. 5, and the La. Revised Statutes do not vest the governor with express or implied power and authority to legally represent the State in any civil or criminal action or proceeding. That power and authority is constitutionally vested exclusively in the Attorney General as chief legal officer and in the attorneys who are subject to his authority as chief legal officer.

9.

Defendants LEVIN and CALOBRISI were originally employed by contract after the July 19, 1989 federal court judgment to provide legal services in *United States of America v. Louisiana*, a federal desegregation suit involving Louisiana colleges and universities. Their contract has

expired, and there is no constitutional provision authorizing the Governor to employ them as legal representatives of the State in any civil proceeding nor any statute providing such putative authority to ROEMER, LEVIN or CALOBRISI.

10.

Notwithstanding this absence of legal authority, defendants KENNEDY, LEVIN AND CALOBRISI, acting as legal counsel for defendant ROEMER and pursuant to ROEMER's direction, have illegally purported to act as the legal representative and attorney for the State of Louisiana in several different civil actions and proceedings in which the State of Louisiana is a party. This knowing and intentional violation of the Louisiana Constitution is particularly egregious because the Attorney General is also counsel of record for the State of Louisiana in these civil actions and proceedings.

11.

Defendants ROEMER and KENNEDY have stated that the Governor intends, through his special counsel, to continue to illegally enroll and intervene as counsel of record and the putatively authorized legal representative of the State of Louisiana in federal and state civil proceedings in which the State has been made a party.

12.

These acts by ROEMER, KENNEDY, LEVIN AND CALOBRISI are an unconstitutional usurpation and

infringement of the power and authority expressly vested in the Attorney General as chief legal officer by Art. IV, Sec. 8 of the Louisiana Constitution of 1974. These acts by ROEMER, KENNEDY, LEVIN AND CALOBRISI are unlawful and *ultra vires*.

13.

In particular, ROEMER, KENNEDY, LEVIN AND CALOBRISI have violated the Constitution by their illegal attempt to represent the State in the federal desegregation suit against the State of Louisiana and its colleges and universities, *United States of America v. Louisiana*, Civil Action No. 80-3300 upon the docket of the United states District Court for the Eastern District of Louisiana.

14.

On January 20, 1989, the Attorney General as an accommodation to the Governor, granted KENNEDY'S request that Kennedy be allowed to enroll as co-counsel for the State of Louisiana in these proceedings with the Attorney General, who had served as counsel of record in the desegregation lawsuit since 1974. LEVIN and CALOBRISI were allowed to also enroll on the motion of the Attorney General shortly after KENNEDY became co-counsel of record. They were selected and employed by Governor ROEMER. *See* Affidavit of Winston DeCuir, Exhibit "A" attached.

15.

KENNEDY, LEVIN and CALOBRISI had (and have) no constitutional authority to represent the State of Louisiana in this civil proceeding, and no legal right to enroll on their own motion. Their entitlement to represent the State was derived solely from the authorization of the Attorney General. KENNEDY, LEVIN and CALOBRISI were enrolled as counsel by motion of the Attorney General. (Motions to Enroll attached hereto, made part hereof, and marked Exhibit "B".)

16.

On July 19, 1989, the federal court rendered judgment, finding that the principal cause of the lingering vestiges of *de jure* segregation was the constitutional structure for governance of higher education. The court held that the Board of Regents and the three management boards established by La. Const. Art. VIII, Sec. 5, 6, 7, 8 perpetuated a dual educational system, and judicially nullified and delegitimated those provisions of the Louisiana Constitution instituted by the people of Louisiana in 1974. The federal court then, *ex proprio motu*, judicially created a single board to govern higher education in Louisiana and ordered its implementation by the State.

17.

Governor ROEMER chose to support the federal court's order to create a single board. The Attorney General discerned his duty to be to uphold and preserve the Louisiana Constitution, until and unless the United States

Supreme Court ruled that the constitutional polity for governing and administering higher education established by La. Const. Art. VIII, Sec. 5, 6, 7, 8 (1974) was in fact in conflict with the United States Constitution and that the remedy fashioned by the federal district court was legally correct.

18.

The Attorney General sought a stay order and judicial review of the federal district court's decree, on behalf of the State of Louisiana, in the United States Supreme Court. *On behalf of the State of Louisiana,* acting on ROEMER'S instruction, KENNEDY opposed the application for judicial review and sought to defeat it.

19.

On August 11, 1989, the Attorney General wrote to KENNEDY, LEVIN and CALOBRISI and withdrew, pursuant to his plenary authority, all delegated authority for KENNEDY, LEVIN and CALOBRISI to continue to act as an authorized legal representative of the State of Louisiana. Nonetheless, at ROEMER'S direction, KENNEDY, LEVIN and CALOBRISI have continued to do so, appearing in the continuing federal desegregation suit. (A copy of the August 11, 1989 letters from the Attorney General to KENNEDY, LEVIN and CALOBRISI removing them as attorneys for the State is attached hereto, made part hereof and marked Exhibit "C" and "D" for identification.)

20.

From January 20, 1989 until August 11, 1989, defendant KENNEDY, LEVIN and CALOBRISI lawfully represented the State of Louisiana in the desegregation case by reason of the permission of the Attorney General. Since August 11, 1989 until present, KENNEDY, LEVIN and CALOBRISI have no lawful authority to represent the State, and their real client in interest has been Governor ROEMER. During this time, They have acted to facilitate and support and defend the federal court's decision, and thus to aid the judicial nullification of the Louisiana Constitution, which is materially adverse to the rights and interests of their former client, the State of Louisiana.

21.

Plaintiff STATE OF LOUISIANA is entitled to declaratory judgment: (1) declaring the sovereign right and interest of the State of Louisiana to the legal viability of its Constitution and to the full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution, Art. VIII, declared invalid by the federal district court in *USA v. Louisiana;* and (2) declaring it to be unconstitutional for governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representative of the State of Louisiana in any civil or criminal proceeding, and (3) declaring that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of Louisiana in *USA v. Louisiana* is not authorized in law, is *ultra vires,* and is unconstitutional, from the date of their termination as

attorney for the State by the Attorney General until the present day, and therefore is legally null and void as of August 11, 1989.

22.

Plaintiff STATE OF LOUISIANA is entitled to a preliminary injunction, and thereafter to a permanent injunction: Restraining, enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting, purporting to act or identifying themselves as the lawfully authorized legal representatives of the State of Louisiana in any civil or criminal action or proceeding in either state or federal court, and in particular enjoining to act and identify themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300 on the docket of the United States District Court for the Eastern District of Louisiana, by reason of their violation and infringement of La. Const. Art. IV, Sec. 8 (1974) and R.S. 49:257B.

WHEREFORE, THE STATE OF LOUISIANA PRAYS:

1. That the furnishing of bond be dispensed with pursuant to R.S. 13:5036:

2. That the Honorable CHARLES E. "BUDDY" ROEMER, III, Governor of the State of Louisiana, and JOHN N. KENNEDY, Special Counsel to the Governor, and JOSEPH LEVIN, JR. and CARLA CALOBRISI, be served with these proceedings and duly cited, and that they be duly ordered to show cause on the date and time to be fixed by this court why a preliminary injunction should not issue restraining, enjoining, and prohibiting

ROEMER, KENNEDY, LEVIN and CALOBRISI from acting, purporting to act, or identifying themselves as the lawfully authorized legal representatives of the State of Louisiana in any civil or criminal action or proceeding in either state or federal court, and in particular enjoining and restraining ROEMER, KENNEDY, LEVIN and CALOBRISI from continuing to act and identify themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300 on the docket of the United States District Court for the Eastern District of Louisiana, by reason of their violation and infringement of La. Const. Art. IV, Sec. 8 (1974) and enabling legislation.

3. That upon trial on the merits, that judgment be rendered in favor of the STATE OF LOUISIANA, decreeing the above described acts to be a violation of the Constitution and statutes of Louisiana, perpetuating the said preliminary writ of injunction and making it permanent in the form and substance of the preliminary injunction; and

4. That the court render judgment in favor of the STATE of LOUISIANA declaring: (1) that the STATE OF LOUISIANA has an inherent and sovereign right and interest in the legal subsistence and efficacy of its constitution as a whole, and to a full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution declared invalid by the federal district court in *USA v. Louisiana;* and (2) that it is unconstitutional under La. Const. Art. IV, Sec. 8 (1974) for Governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in *any* civil or criminal

action or proceeding; and (3) that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of Louisiana in *USA v. Louisiana* was not authorized in law, was *ultra vires* and was unconstitutional, from the date of their lawful termination as attorneys for the State of Louisiana on August 11, 1989 until the present day, and that therefore all acts and statements by KENNEDY, LEVIN and CALOBRISI as a putative legal representative of the State during this period were null and void *ab initio*.

5. For full, general and equitable relief.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
LSBA Bar Roll No. 2248

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant
Attorney General

JESSE J. MARKS
Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

CHARLES J. YEAGER
Assistant Attorney General

DALE C. WILKS
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013

Attorneys for the State of Louisiana

STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL	CIVIL DISTRICT COURT
VERSUS	PARISH OF ORLEANS
CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI	STATE OF LOUISIANA

AFFIDAVIT OF VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared DALE C. WILKS, who being duly sworn did depose and say:

That he is duly commissioned Assistant Attorney General and by law is an authorized legal representative for plaintiff, the State of Louisiana, and is counsel of record for plaintiff herein, and that all allegations of fact in the foregoing petition for declaratory judgment and injunctive relief are true and correct to the best of his information, knowledge and belief.

Witnesses:

_____

_____

_____

DALE C. WILKS
Assistant Attorney General
La. Department of Justice
123 Loyola Building
New Orleans, LA 70112
(504) 342-7013

SWORN TO AND SUBSCRIBED before the undersigned Notary Public this ___ day of ___, 1990 in New Orleans, Louisiana.

NOTARY PUBLIC

STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL	CIVIL DISTRICT COURT
VERSUS	PARISH OF ORLEANS
CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI	STATE OF LOUISIANA

ORDER

Considering the verified petition filed herein:

IT IS ORDERED that the defendants, Governor Buddy Roemer, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi, show cause on the ___ day of ___, 1990, beginning at ___ ___.m., why a preliminary writ of injunction, in the form and substance prayed for in the petition, should not be issued herein.

THUS DONE, READ AND SIGNED in Chambers at New Orleans, Louisiana on this ___ day of ___, 1990.

JUDGE
Orleans Civil District Court

Service Instructions:

1. Charles E. "Buddy" Roemer, III, may be served either at the Governor's Mansion in Baton Rouge, Louisiana, or in his office on the 4th Floor of the State Capitol Building in Baton Rouge, Louisiana.

2. John N. Kennedy, Special Counsel to the Governor, may be served at his domicile at 1147 Constantinople Street, New Orleans, Louisiana, during the evening hours or on weekends.

3. Request Dale C. Wilks to serve defendants, Joseph Levin, Jr. and Carla Calobrisi, in accordance with procedure set forth in R.S. 13:3204 and R.S. 13:3201 *et seq.*, generally, the Louisiana "Long Arm Statute." Their last known address is 2000 M Street, NW, Washington, D.C. 20036-3307.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

STATE OF LOUISIANA *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, Plaintiff, v. CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN JR. AND CARLA CALOBRISI, Defendants.	Civil Action No. 90-4109 SECT.K MAG.4 FILED OCT 12, 1990

NOTICE OF REMOVAL OF CASE
PURSUANT TO 28 U.S.C. SEC. 1441

To the Judges of the United States District Court for the Eastern District of Louisiana:

Petitioners Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin Jr., and Carla Calobrisi (hereinafter collectively "Petitioners" or "Defendants"), respectively state:

1. On or about October 9, 1990, an action was commenced against Defendants in the Louisiana Civil District Court for Orleans Parish entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr. and Carla Calobrisi*, case number 90-19640, Division H. A copy of the Petition for Declaratory Relief and Injunctive Relief and the Service Instructions is attached hereto as Exhibit A.

On information and belief, no further pleadings have been served or filed in the state court.

2. This Notice for Removal is filed within the time limits prescribed by 28 U.S.C. Sec. 1446(b).

3. A copy of this Notice for Removal has been delivered to the Clerk of the Louisiana Civil District Court for Orleans Parish, pursuant to 28 U.S.C. Sec. 1446(d).

4. The above-described action is a civil action in which this Court has original jurisdiction under the provisions of 28 U.S.C. Sec. 1331 and is one which may be removed to this Court by the Petitioners, pursuant to 28 U.S.C. Sec. 1441 *et seq.*, in that it is a civil action brought under several sources of federal law.

5. First, federal case law provides, under circumstances such as exist here, that a state's governor is the proper representative of the state in litigation to which the state is a party. *See, e.g., Graddick v. Newman*, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990).

6. The Local Rules for the United States District Court for the Eastern District Court for the Eastern District of Louisiana ("Local Rules") give this Court specific jurisdiction over determinations of who may appear in the Eastern District. *See* Local Rule 20. Those Rules, promulgated "in accordance with Rule 83 of the Federal Rules of Civil Procedure," Preamble to Local Rules, outline the requirements for practice before the Court, as well as provide the Court with jurisdiction over disciplinary action against attorneys practicing before it. *See* Local Rule 20; Rules of Disciplinary Enforcement of the United

States District Court for the Eastern District of Louisiana, Rule II (Appendix to Local Rules). It is apparent from the face of the Attorney General's Petition that he is seeking a determination and an injunction by the Louisiana Civil District Court that Petitioners may not appear in *United States v. Louisiana*, a case currently pending before this Court. Such a request is properly addressed to the federal court possessing jurisdiction over *United States v. Louisiana*. Moreover, the Attorney General's Petition essentially seeks a determination and an injunction by a state court as to who represents the State of Louisiana in the federal court; according discussed above, federal courts possess jurisdiction over such matters.

7. Mr. Guste's Petition may also be seen as a thinly-veiled attempt to pursuade a state court to issue an injunction that would have the effect of enjoining a federal court from proceeding with a matter remanded to it by the United States Court of Appeals for the Fifth Circuit. Because the Fifth Circuit has placed the issue of the State's representation before the United States District Court, indicating that this Court does indeed have jurisdiction over this matter and is the proper forum for such a determination, the Attorney General should not be permitted to seek injunctive and declaratory relief from a state court whose determination of the issue, if contrary to that of the federal court, would serve to order the federal court to act contrary to its own decision in the matter.

8. Title 28, Section 1441(c) of the United States Code provides further grounds for granting the instant Notice of Remove, where that Section provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein . . .

28 U.S.C. Sec. 1441(c). Should this Court determine that part of Mr. Guste's Petition seeks a determination of state law, the Petitioners herein submit that, at the very least, one part of the Attorney General's Petition is a direct request for a determination arising under federal law. As the Attorney General states, his request for relief seeks an injunction:

> enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting . . . as the lawfully authorized legal representatives of the State of Louisiana . . . , and *in particular* enjoining to act and identify [*sic*] themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300. . . .

Petition for Declaratory and Injunctive Relief at 7-8 (emphasis supplied). The Attorney General seeks a determination of who may practice before this Court and who may represent a litigant in the federal case. This is a matter for determination by this Court and certainly provides federal jurisdiction, sufficient for removal of that issue, as well as any other issue set forth in Mr. Guste's petition, but not otherwise removable.

WHEREFORE, Petitioners pray that this action be removed to this Court, this Court accept jurisdiction of this action and this action be placed on the docket of this

Court for further proceedings as though this action had originally been instituted in this Court.

Respectfully submitted,

/s/ Charles E. "Buddy" Roemer, III by Jnk
Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ John N. Kennedy
John N. Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Joseph J. Levin, Jr. by Jnk
Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/ Carla Calobrisi by Jnk
Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF LOUISIANA, *ET AL.* Defendants.	Civil Action No. 80-3300 Section "A"
STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, Plaintiff, v. CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N, KENNEDY, JOSEPH LEVIN, JR. AND CARLA CALOBRISI, Defendants.	Civil Action No. 90-4109 Section "A"

MEMORANDUM IN OPPOSITION TO MOTION FOR REMAND, NULLIFICATION OF REMOVAL, COSTS, EXPENSES, AND ATTORNEYS' FEES, AND IMPOSITION UPON DEFENDANTS OF SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants, Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully submit this Memorandum in opposition to Motion for Remand, Nullification of

Removal, Costs, Expenses, and Attorneys' Fees, and Imposition upon Defendants of Sanctions under Rule 11 of the Federal Rules of Civil Procedure, filed by Plaintiff Attorney General William J. Guste, Jr. ("Motion for Remand").

I. INTRODUCTION

Given the expedited nature of the Attorney General's Motion for Remand, the Defendants in this case have not had the opportunity to analyze thoroughly the Attorney General's allegations, but instead submit the following brief analysis of the pertinent issues presented in the Motion for Remand.

II. BACKGROUND

Civil Action Number 80-3300, *United States v. Louisiana*, has been pending in this and other federal courts since 1974. One of the primary issues currently being litigated is whether the Attorney General or the Governor properly represents the State of Louisiana in this federal court litigation to which the State is a party. The action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr. and Carla Calobrisi*, was commenced on or about October 9, 1990, in the Louisiana Civil District Court for Orleans Parish. The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief is whether the Governor or the Attorney General is the proper representative of the State of Louisiana in this federal court litigation to which the State is a party. The same question of law and fact is

pending before this Court in Civil Action Number 80-3300, *United States v. Louisiana*. On October 12, 1990, Defendants filed a Notice of Removal of Case, pursuant to 28 U.S.C. Section 1441, and a Motion to Transfer and Consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*. The Court consolidated the two actions on October 19, 1990.

III. THIS COURT POSSESSES JURISDICTION OVER THE REMOVED ACTION

As set forth in the Notice of Removal, this Court possesses original jurisdiction over the removed action pursuant to 28 U.S.C. Section 1331, which provides that the district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. It is not necessary for the Court to address issues of state law. As such, the Court may assert jurisdiction based on several sources of federal law, each sufficient to defeat the Attorney General's attempt to remand. First, federal common law provides this Court with jurisdiction over the subject matter at issue in the removed action. Applying the common meaning of the word "law," the Supreme Court has concluded that Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory or constitutional origin. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 n.5 (1959). Federal common law provides, under circumstances such as exist here, that a federal court may indeed decide that a state's governor is the proper representative of the state in litigation to which the state is a party. *See, e.g., Graddick v.*

Newman, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990). As the Attorney General is well aware, *Graddick* and *Williams* have been cited by Defendants in this and other litigation to show that federal courts have indeed made determinations such as the one at issue without resorting to state law. For purposes of determining federal question jurisdiction, the value of *Graddick* and *Williams* lies as much in the willingness of the courts to render decisions on this subject as in the substance of the courts' decisions themselves. These sources, in addition to those discussed in Defendants' Notice of Removal, provide the Court with more than adequate jurisdiction in this action. *See* Notice of Removal at 2-3.

Despite the Attorney General's assertion that his petition presents only state issues, it was Mr. Guste who brought these very issues before the United States Supreme Court in his Motion to Supersede Counsel For State of Louisiana and to Strike Response in Opposition to the State's Motion for a Stay Addressed to Individual Justice. Placing the question of who represents the State before the highest federal court, Mr. Guste should not now be allowed to disclaim the jurisdiction of this federal court over the very same issue. Indeed, the Attorney General has admitted that this Court is empowered with authority to determine who may practice before it, having asked this Court to issue an order accepting his designation of counsel for the State of Louisiana, as provided in his Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel.

If anything, Mr. Guste has made this even more of a federal question by seeking injunctive relief from a state

court as to determinations eminating from a federal court. While Congress has authorized courts of the United States to restrain state court proceedings in special circumstances, state courts are completely without power to restrain federal court proceedings. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977). *See Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964); *Meridian Investing & Development Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 372 (5th Cir. 1980). This well-established rule is in no way relaxed because the prohibition is addressed to the parties rather than the federal court itself. *Felter*, 434 U.S. at 17. *See Donovan*, 377 U.S. at 413. The Attorney General's petition, though not addressed directly to this Court, constitutes a poorly disguised attempt to enjoin this Court from proceeding with a matter remanded to it by the Fifth Circuit. Such an attempt should not be allowed.

IV. CONCLUSION

Federal question jurisdiction clearly appears on the face of the Attorney General's petition, and thus, remand is inappropriate in this case. Mr. Gustee's Motion to Remand, spiked with *ad hominem* allegations of improper actions on the part of the Governor of Louisiana and counsel for the State, may be viewed simply as a manipulative attempt to interfere with this Court's proceedings. Such tactics have been repudiated by the Supreme Court and should be rejected be this Court as well. *See Carnegie-Mellon University v. Cohill*, ___ U.S. ___, 108 S.Ct. 614, 622 (1988). Finally, the Attorney General's motion for sanctions under Rule 11 is even less meritorious than his removal argument and should, therefore, be denied.

Respectfully submitted,

/s/ Charles E. "Buddy" Roemer, III,
Charles E. "Buddy" Roemer, III,
Governor of the
State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Joseph J. Levin, Jr.
Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/ John N. Kennedy
John N. Kennedy
Special Counsel to the
Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Carla Calobrisi
Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 26, 1990

No. 90-1647

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

IN RE: STATE OF LOUISIANA *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

Petitioner

Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana

SUPPLEMENT TO PETITION FOR MANDAMUS

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

22 May, 1991

PAUL R. BAIER
Special Assistant Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Pursuant to the Court's Rule 15.7, the State of Louisiana *ex rel.* William J. Guste, Jr., Attorney General, and William J. Guste, Jr., in his official capacity as Attorney General of Louisiana, hereby supplement their petition for mandamus by calling attention to an intervening decision of this Court not available at the time of filing of the petition.

On May 20, 1991, this Court decided *Primate Protection League v. Tulane Ed. Fund*, ___ U.S. ___, 1991 WL 79118 (U.S.), a case which Your Honors held was unlawfully removed from a Louisiana state court to federal court by the NIH. The state court petition, which sought to protect certain primates, relied exclusively on Louisiana state law. This Court held that NIH lacked statutory authority to remove petitioners' suit to federal court. In the course of the Court's opinion (per Marshall, J.), it is said that, "Petitioners' injury is clear, for they have lost the right to sue in Louisiana court – the forum of their choice." 1991 WL 79118, *4 (U.S.). And the Court repeated the fundamental rule of Section 1447(c) that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded." *Id.* at *9. And more: "Since the district court had no original jurisdiction over this case . . . , a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *Id.* (cross reference omitted).

Your Honors concluded:

> "The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall be remanded.*' 28 U.S.C. § 1447(c) (emphasis added). We therefore reverse the decision of the Court of Appeals and remand the case to the District Court with instructions that the case be remanded to the

> Civil District Court for the Parish of Orleans, Louisiana."

Id. at *10.

All of this black-letter, of course, likewise compels a remand of *Guste v. Roemer* to the Civil District Court for the Parish of Orleans, which is the precise relief prayed for in our mandamus petition, p. 30.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

22 May, 1991

PAUL R. BAIER
Special Assistant Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-1647

IN THE

Supreme Court Of The United States

October Term, 1990

IN RE: STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND
WILLIAM J. GUSTE, JR., IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,
Petitioner

BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JOHN N. KENNEDY
Counsel of Record
Special Counsel to the Governor
Office of the Governor
4th Floor, State Capitol
P.O. Box 94004
Baton Rouge, Louisiana 70804
(504) 342-7015

JOSEPH J. LEVIN, JR.
JOHN M. FREEMAN
JOHANNA F. CHANIN
Colton and Boykin
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

Counsel For Charles E. "Buddy" Roemer, III,
Governor Of The State Of Louisiana, John N. Kennedy,
Joseph J. Levin, Jr. and Carla Calobrisi

Balmar Legal Publishing Division, Washington, D.C. 2000 (202) 659-3610

QUESTION PRESENTED

Whether the extraordinary relief of writ of mandamus should be granted to vacate the final judgment of the United States District Court for the Eastern District of Louisiana in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as the attorneys for the State of Louisiana in the litigation.

LIST OF PARTIES

Petitioner in this action is the State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General, and William J. Guste, Jr., in his official capacity as Attorney General of Louisiana. Respondents include Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana; John N. Kennedy; Joseph J. Levin, Jr.; Carla Calobrisi; and the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINION BELOW 3

JURISDICTION 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 10

REASONS FOR DENYING THE WRIT 11

A. PETITIONER HAS FAILED TO ESTABLISH CIRCUMSTANCES JUSTIFYING THE EXTRAORDINARY REMEDY OF WRIT OF MANDAMUS. 11

1. Petitioner Has Failed To Satisfy His Burden Of Establishing No Other Adequate Means To Attain The Relief He Seeks. 12

2. Petitioner Has Failed To Establish A Clear And Indisputable Right To The Issuance Of A Writ Of Mandamus. 14

a. The Determination Of The Right And Manner Of Counsel Participation Before A United States District Court Constitutes A Federal Question. 15

i). The District Court Possessed Statutory And Inherent Judicial Power To Decide The Issue. 16

ii). Federal Common Law Supports The District Court's Ruling. 19

b. Procedural And Ethical Considerations Barred Mr. Guste From Pursuing His Course Of Action. 21

c. Louisiana Case Law And The Louisiana Constitution Reject Mr. Guste's Attempt To Exercise Legal Supremacy Over The Governor. 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES	PAGE
Agosto v. Barcelo, 594 F. Supp. 1390 (D. P.R. 1984)	13
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	10, 11, 12, 14
Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc), *cert. granted, sub nom. Ayers v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991) (consolidated with *United States v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991))	9
Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953)	10, 11, 14
Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States, ___ U.S. ___, 110 S.Ct. 708 (1990)	7
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	26
Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962)	22
Donovan v. City of Dallas, 377 U.S. 408 (1964)	18
Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	17
Fraizer v. Heebe, 482 U.S. 641 (1987)	16
General Atomic Co. v. Felter, 434 U.S. 12 (1977)	18
Graddick v. Newman, 453 U.S. 928 (1981)	19, 20, 21
Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1 (1st Cir. 1984)	12, 13
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	19
In re McDonald, 489 U.S. 180 (1989)	11
In re Sindram, ___ U.S. ___, 111 S.Ct. 596 (1991)	10, 11, 12, 14
Kerr v. United States District Court for the Northern District of California, 426 U.S. 394 (1976)	10, 11

TABLE OF AUTHORITIES (Continued)

Kleiner v. First National Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985) 16

Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States, ___ U.S. ___, 110 S.Ct. 708 (1990) 7

Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States, ___ U.S. ___, 110 S.Ct. 708 (1990) 7

Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States, 492 U.S. 934 (1989) 7

Massachusetts v. Feeney, 429 U.S. 66 (1976) 26

Meridian Investing & Development Corp. v. Suncoast Highland Corp., 628 F.2d 370 (5th Cir. 1980) . . . 18

Mongoose Gin Co. v. United States, 331 F.2d 483 (5th Cir. 1964) 22

Norton v. Tallahassee Memorial Hospital, 700 F.2d 617 (11th Cir. 1983) 16

Nowling v. Aero Services Intern., Inc., 734 F. Supp. 733 (E.D. La. 1990) 17, 18

People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 172 Cal. Rptr. 478, 624 P.2d 1206 (Cal. 1981) 22, 23

Primate Protection League v. Tulane Ed. Fund, 59 U.S.L.W. 4424 (U.S. May 20, 1991) (No. 90-89) 15

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) . . 14, 16

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) . . 11

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 19

Seney v. Swift Co., 260 U.S. 146 (1922) 22

TABLE OF AUTHORITIES (Continued)

Southern University Board of Supervisors v. United States, 492 U.S. 934 (1989) 7

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 19

State of Louisiana ex rel. Guste v. Texaco, Inc., 433 So. 2d 756 (La. App. 1st Cir. 1983) 27

United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) 16

United States v. Duell, 172 U.S. 576 (1899) 11

United States v. Louisiana, 751 F. Supp. 606 (E.D. La. 1990) 9

United States v. Louisiana, 751 F. Supp. 608 (E.D. La. 1990) . . . . . *passim*

United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988) 4, 25

United States v. Louisiana, 90 F.R.D. 358 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982) 4

United States v. Louisiana, 527 F. Supp. 509 (E.D. La. 1981) 3

United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976) 4

Villareal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976) 17

Will v. United States, 389 U.S. 90 (1967) 11, 12

Williams v. McKeithen, No. 71-98-B (M.D. La. July 20, 1990) (Westlaw, 1990 WL 265971) 19

CONSTITUTIONAL PROVISIONS

La. Const. art. IV, sec. 5(A) 28

La. Const. art. IV, sec. 8 . . . . . 27, 28

La. Const. art. VIII, secs. 5-7 21

TABLE OF AUTHORITIES (Continued)

STATUTES

28 U.S.C. Section 1331 . . . . . 15, 19
28 U.S.C. Section 1441 . . . . . 9, 15
28 U.S.C. Section 1441(a) 16
28 U.S.C. Section 1441(c) 16
28 U.S.C. Section 1442 (a)(1) 15
28 U.S.C. Section 1651(a) 3
28 U.S.C. Section 1654 16
La. Rev. Stat. Ann. Sec. 17:1453 21
La. Rev. Stat. Ann. Sec. 17:1831 21
La. Rev. Stat. Ann. Sec. 17:1851 21
Ala. Code Sec. 36-15-21 (1975) 21

RULES

American Bar Association Model Rules of Professional Conduct 23, 24
California State Bar Association Rules of Professional Conduct, Rule 5-102 . . . . . 23, 24
Louisiana Rules of Professional Conduct 23, 24, 26
Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, Rule II 24
Rules of the Supreme Court of the United States, Rule 20.1 . . . . . 11, 12

OTHER AUTHORITIES

Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765 (1977) 28, 29
Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI 28, 29

No. 90-1647

IN THE

Supreme Court Of The United States

October Term, 1990

IN RE: STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND
WILLIAM J. GUSTE, JR., IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,
Petitioner

BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

The Attorney General for the State of Louisiana has requested that a writ of mandamus issue to the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana, directing him to vacate the final judgment of the United States District Court for the Eastern District of Louisiana in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as the attorneys for the State of Louisiana ("State") in the litigation. Although the Attorney General states that Civil Action Number 90-4109[1] is the subject of his Petition for Writ of Mandamus ("Petition" at 8), Mr. Guste goes on to request that the Court, "issue a writ of mandamus to the district court below[] directing it to vacate its October 30, 1990,

[1] Civil Action Number 90-4109, originally commenced in the Louisiana Civil District Court for Orleans Parish with the filing of the Attorney General's Petition for Declaratory Judgment and Injunctive Relief, was removed by Respondents to federal district court. *See* discussion *infra* at 8, 17-19.

judgment, opinion and order on the representation of the State . . . ." Petition at 30. As is made clear below, the issue of representation of the State was before the district court in both Civil Action Number 80-3300 and Civil Action Number 90-4109. In fact, the issue of representation of the State had been a subject of contention in Civil Action Number 80-3300 since August 1989 and had been scheduled for briefing before the district court in the Fall of 1990, prior to the Attorney General's state court action for declaratory judgment and injunctive relief.

At the time of the district court's determinations, Civil Action Number 80-3300 was before the court on the Attorney General's Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel. Civil Action Number 90-4109 was before the court on the Attorney General's motion to remand to state court. In each action, the Attorney General sought to prevent John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi[2] from representing the State in Civil Action Number 80-3300.

Inexplicably, Mr. Guste's Petition fails to inform this Court that his appeal from the district court's final judgment pertaining to the representation of the State is currently pending before the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in Case Number 90-3864. Mr. Guste filed his brief on the representation issue on April 11, 1991. Thereafter, on April 24, 1991, one day following the filing in this Court of his Petition for Writ of Mandamus, the Attorney General submitted to the Fifth Circuit his Motion to Expedite Appeal and to Certify Questions to the Louisiana Supreme Court ("Motion to Expedite and to Certify") (Appendix at 1a). In an order dated May 15, 1991 (Appendix at 6a), the Fifth Circuit granted Mr. Guste's motion to expedite the appeal. That order reflects that the

[2] On October 16, 1990, the district court granted the motion of Carla Calobrisi (Mr. Levin's former associate) to withdraw as co-counsel. Ms. Calobrisi has neither represented the State of Louisiana or the Governor, nor made any appearance personally or by way of memoranda or other formal filings since February 28, 1990. Despite her withdrawal, Mr. Guste continues to refer to Ms. Calobrisi as a party to the litigation, though he did not object to her request to withdraw or appeal the court's order granting her withdrawal from the case. In a recent filing, Mr. Guste "explained" Ms. Calobrisi's continued presence by stating that she remains a named defendant in the state court action for declaratory judgment and injunctive relief. Ms. Calobrisi's withdrawal, however, renders injunctive relief against her entirely unnecessary.

Attorney General's motion to certify questions to the Louisiana Supreme Court is "carried with the case." Appendix at 6a. Oral argument has been scheduled for July 8, 1991.

OPINION BELOW

On October 30, 1990, the United States District Court for the Eastern District of Louisiana entered its "Opinion and Order on the Representation of the State" in *United States v. Louisiana*, Civil Action Number 80-3300, consolidated with *Louisiana, ex rel. William J. Guste, Jr., Attorney General v. Charles E. "Buddy" Roemer, III, Governor, et al.*, Civil Action Number 90-4109, designating John N. Kennedy and Joseph J. Levin, Jr. as "sole trial counsel representing the State of Louisiana in Civil Action Number 80-3300." *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990).

JURISDICTION

Petitioner seeks the extraordinary remedy of writ of mandamus. Jurisdiction is predicated upon 28 U.S.C. Section 1651(a).

STATEMENT OF THE CASE

The Attorney General's Statement of the Case presents only a partial picture of the pertinent facts involved in this matter. Only through a complete review of the facts may this Court fully appreciate the context in which the representation issue was presented to the district court, the egregious conduct on the part of Mr. Guste, and the utter impropriety of the Attorney General's request for the issuance of a writ of mandamus.

In 1974, the United States (the "Government") instituted a lawsuit against the State and other defendants alleging violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. In 1981, without any admission of liability, the parties entered into a Consent Decree which was approved by the United States District Court for the Eastern District of Louisiana. See *United States v. Louisiana*, 527 F. Supp. 509

(E.D. La. 1981).[3] Upon expiration of the Consent Decree, the district court requested that the parties submit motions for summary judgment and, on August 2, 1988, the district court granted the Government's motion for partial summary judgment on the issue of liability. *See United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988). In its Minute Entry dated October 7, 1988, the district court instructed the parties to submit proposed plans to desegregate public higher education in Louisiana, and the case moved into its remedy phase.

Throughout the liability phase of the case, the State was represented by Attorney General William J. Guste, Jr., his staff attorneys and John N. Kennedy, who serves as Special Counsel to Governor Charles E. "Buddy" Roemer, III and as Secretary to the Governor's Cabinet. Additionally, as was noted by the district court, after the case entered its remedy phase, Joseph J. Levin, Jr. was also retained to represent the State with Mr. Guste's knowledge and explicit consent. *United States v. Louisiana*, 751 F. Supp. at 612. Thereafter, on January 18, 1989, Mr. Guste's Assistant Attorney General, Winston DeCuir, filed a motion formally requesting the district court to admit John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi (Mr. Levin's then associate) as additional counsel to represent the State. *See* Motion to Enroll Additional Counsel of Record (Petitioner's Appendix at 59a).[4]

Mr. Guste and his staff, while remaining as co-counsel, took a much less active role during the remedy phase of the litigation. 751 F. Supp. at 612. While Attorney General Guste appeared in the case a number of times during its liability phase, he thereafter made no further appearances until August of 1989, when, after the case's remedy phase was complete, he sought to reverse the State's position on remedy. *See id.* at 612-13. The case, at that time, had been virtually completed in the trial court. On the other hand, Mr. Kennedy's participation in the case on behalf of the State began in the Fall of

---

[3] For the earlier history of the case, see *United States* v. *Louisiana*, 543 F.2d 1125 (5th Cir. 1976); *United States v. Louisiana*, 90 F.R.D. 358 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982).

[4] The Motion to Enroll designated Mr. Kennedy and Mr. Levin as trial attorneys, Ms. Calobrisi as additional counsel of record and Mr. DeCuir as resident attorney. *See id.* The district court designated Mr. Kennedy as trial attorney, Mr. DeCuir as local attorney and Mr. Levin and Ms. Calobrisi as additional counsel. *See* Order (dated Jan. 20, 1989) (Petitioner's Appendix at 62a).

1987, continued through the district court's issuance of its final judgments, and included approximately 64 appearances, spanning both the liability and remedy phases. *See id.* at 612. Those appearances included the submission of formal filings to the district court, as well as attendance at hearings, status conferences, depositions, settlement conferences and negotiations, and similar related meetings. After he became involved in the litigation, Mr. Kennedy, along with Mr. Levin, took the lead in the State's representation, drafting documents, filing motions, conducting discovery, attending hearings and presenting evidence on behalf of the State. *Id.*

On August 2, 1989, after the district court had issued its Opinion and Order of July 19, 1989, prescribing the remedy ("Remedial Order"), and while Governor Roemer was out of the country, Mr. Guste suddenly filed a post-trial motion, entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" ("Notice to Join") (Appendix at 7a). *See* 751 F. Supp. at 613. This filing by Mr. Guste surprised most of the parties with the exception of the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University") and its counsel, State Senator William J. Jefferson.[5] The Notice to Join was a surprise because Mr. Guste had never expressed any previous objection to the State's proposed remedy, which was supported by the State, the Board of Regents of the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees") and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), and had been adopted in material part by the district court. Ironically, one of Mr. Guste's fundamental objections to the Remedial Order was, and apparently remains, the creation of a single governing board for public higher education in Louisiana to replace the current four boards. The single board was the principal remedy unceasingly and publicly promoted by the State (and opposed by

---

[5] Southern University not only knew Mr. Guste was joining its motion, but Mr. Guste admitted that Senator Jefferson prepared Mr. Guste's Notice to Join and actually filed the motion for Mr. Guste. *Id.* at 613 n.3. *See SU Wrote Guste's Motion*, The Shreveport Times, Sept. 2, 1989, 1A col. ___ (Appendix at 9a); *Jefferson was Convenient for College Case, Guste Says*, The Times-Picayune, Sept. 3, 1989, A-35 col. ___ (Appendix at 12a).

Southern University) for more than nine months with Mr. Guste's knowledge and consent. 751 F. Supp. at 613.

Mr. Guste's challenge to the Remedial Order was also puzzling because in his Notice to Join, the Attorney General designated Senator Jefferson, counsel for Southern University, as counsel to represent the "particular interests of the Attorney General," who supposedly represented the State. *Id.* Throughout the litigation, Southern University had been an opponent of the State and the remaining defendants and had closely aligned itself with the plaintiff. *Id.* Mr. Guste, apparently realizing the blatant conflict of interest created by this designation[6], the next day filed a Motion to Withdraw the "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record ("Motion to Withdraw") (Appendix at 14a). In the Motion to Withdraw, Mr. Guste withdrew his appointment of Senator Jefferson and, instead, renamed certain members of his staff as counsel.[7] These filing began Mr. Guste's crusade to alter the State's position and marked the first activity in the case by Mr. Guste since he and Mr. Kennedy represented the State on the issue of liability.

Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring the matter before this Court. *See* 751 F. Supp. at 614. On August 11, 1989, Mr. Guste filed a Motion for Stay Addressed to Individual Justice, seeking to stay the enforcement of the district court's judgment and orders. The only other party filing an application for a stay in the Supreme Court was Southern University. Simultaneous with his motion for a stay, Mr. Guste filed a Notice of Appeal to this Court from the final decree of the three-judge district court. Notice of Appeal, *State of Louisiana ex rel. William J. Guste, Attorney General of Louisiana*, (dated Sept. 18, 1989).[8] On August

---

[6] *See Jefferson was Convenient for College Case, Guste Says,* The Times-Picayune, Sept. 3, 1989, A-35 col. ___ (Appendix at 12a).

[7] At no time did Mr. Guste allege that the Governor's counsel failed to perform their duties properly. Indeed, in his letters of "dismissal" directed to Mr. Kennedy, Mr. Levin and Ms. Calobrisi, Mr. Guste commended their performance. Letters from Mr. Guste to Mr. Levin and Mr. Kennedy (Aug. 11, 1989) (Petitioner's Appendix at 64a).

[8] A separate Notice of Appeal to the Supreme Court was filed jointly by the State, as represented by Governor Roemer, and Regents, Trustees and LSU. Notice of

(Footnote continued on next page)

16, 1989, Mr. Guste, recognizing the highest federal court's authority to make such determinations and offering both federal and state law arguments, asked the Court to remove Mr. Kennedy, Mr. Levin and Ms. Calobrisi as counsel for the State. *See* Motion to Supersede Counsel for State of Louisiana and to Strike Response in Opposition to State's Motion for a Stay Addressed to Individual Justice, *State of Louisiana ex rel. William J. Guste, Jr. v. United States*, No. 89-556 (U.S. dated Aug. 16, 1989) ("Supersession Motion").

The Court granted the motions for stay, pending docketing of the appeals and disposition of the cases by the Court. *Southern University Board of Supervisors v. United States*, 492 U.S. 934 (1989); *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, 492 U.S. 934 (1989). Thereafter, Mr. Guste filed his Jurisdictional Statement with the Supreme Court, purportedly on behalf of the State. Jurisdictional Statement, *State of Louisiana ex rel. William J. Guste, Jr. v. United States*, No. 89-556 (U.S. dated Oct. 5, 1989). A separate Jurisdictional Statement was filed jointly by the State, as represented by Governor Roemer, and Regents, Trustees and LSU. Jurisdictional Statement, *State of Louisiana ex rel. Charles E. "Buddy" Roemer, III v. United States*, No 89-771 (U.S. dated Nov. 15, 1989). Southern University filed a separate Jurisdictional Statement. Jurisdictional Statement, *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, No. 89-557 (U.S. dated Oct. 5, 1989).[9]

Shortly after the appeals were taken to this Court, the district court's decisions pertaining to liability and remedy were also appealed to the Fifth Circuit. The Government and the State filed Motions for

---

(Footnote 8 continued)

Appeal, *State of Louisiana ex rel. Charles E. "Buddy" Roemer, III, et al.*, (dated Sept. 29, 1989). Southern University also filed a Notice of Appeal. Notice of Appeal, *Southern University Board of Supervisors*, (dated Aug. 14, 1989).

[9] On January 8, 1990, this Court entered orders, without opinion, that the direct appeals to it from the district court "are dismissed for want of jurisdiction." *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990); *Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States*, ___ U.S. ___, 110 S.Ct. 708 (1990).

Remand requesting that the action be remanded to the district court for the entry of two further orders: (1) amending the remedial orders to update the time frames for implementation of the remedy; and (2) determining who represents the State in the proceeding. On August 29, 1990, the Fifth Circuit remanded the consolidated appeals to the district court for consideration of those issues. *See* Order, *United States v. Louisiana*, No. 89-3637 (dated Aug. 29, 1990)(Appendix at 18a).

In its Minute Entry of September 21, 1990, the district court ordered Attorney General Guste and counsel for Governor Roemer to submit memoranda, on or before October 9, 1990, briefing the issue of who represented the State in the Title VI proceedings. Appendix at 25a.[10] Pursuant to the court orders, the Attorney General and counsel for the Governor each submitted memoranda addressing the representation issue on October 9, 1990.

Also on October 9, 1990, apparently anxious about the district court's impending ruling on the issue of representation of the State, the Attorney General filed an entirely new action, this time in Louisiana state court. On that date, Mr. Guste commenced in the Louisiana Civil District Court for Orleans Parish the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi.* The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief was whether the Governor or the Attorney General is the proper representative of the State of Louisiana in *United States v. Louisiana*, Case Number 80-3300, the same issue remanded by the Fifth Circuit to the district court and being briefed to the district court at the time of Mr. Guste's state court complaint. In fact, the Citation attached to the Attorney General's state court petition indicated that a show cause hearing had been scheduled in the state court action for October 26, 1990, the very day that briefing to the federal court was to have been completed.

---

[10] In a separate Minute Entry dated October 4, 1990, the district court denied the Attorney General's October 2, 1990, motion to schedule a status conference and to alter the briefing schedule set forth in the court's order of September 21, 1990. Appendix at 28a. The court ordered the parties to comply with the September 21 briefing schedule, and further ordered that any reply memoranda must be filed by October 26, 1990.

On October 12, 1990, pursuant to 28 U.S.C. Section 1441, Respondents removed Mr. Guste's state court action to the United States District Court for the Eastern District of Louisiana. The removed action was assigned Civil Action Number 90-4109 and, upon motion by Respondents, consolidated with Civil Action Number 80-3300.[11] On October 24, 1990, the Attorney General filed his motion to remand the removed action and requested sanctions against Respondents. Respondents filed a memorandum in opposition to the motion for remand on October 26, 1990.

On October 30, 1990, the district court entered its final order designating John N. Kennedy and Joseph J. Levin, Jr. as "sole trial counsel representing the State of Louisiana in Civil Action Number 80-3300." *See United States v. Louisiana*, 751 F. Supp. at 620. The issuance of that order necessarily determined the entirety of the Attorney General's declaratory judgment suit and, thus, the district court denied all relief in that suit. *See id.*[12] The district court recognized that while the Attorney General utilized broad language in his supporting memoranda, the Petition for Declaratory Judgment and Injunctive Relief complained of the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi *solely* in connection with Case Number 80-3300. *See* 751 F. Supp. at 620, 621 n.13. The district court went to great lengths to make clear that nothing contained in its order should be construed to prevent the Attorney General from litigating his right to appear as a representative of the State in a matter not involving the Title VI proceeding. *See id.*

[11] Contrary to the assertions in Mr. Guste's Petition, the Notice of Removal and the request for transfer and consolidation filed October 12, 1990, were each served on Mr. Guste (as indicated in the certificates of service attached thereto). *See* Motion to Transfer and Consolidate (Appendix at 29a). There were no *ex parte* proceedings in this case, as claimed by the Attorney General. *See* Petition at 9.

[12] In a separate judgment, the district court, reconsidering its previous decisions in light of the intervening controlling decision in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), *cert. granted, sub nom. Ayers v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991) (consolidated with *United States v. Mabus*, ___ U.S. ___, 111 S.Ct. 1579 (1991)), vacated its Order of August 2, 1988, denied the Government's motion for summary judgment, and granted summary judgment in favor of all defendants. *See United States v. Louisiana*, 751 F. Supp. 606 (E.D. La. 1990). The Government's appeal of that judgment, that of Southern University and various cross appeals are pending before the Fifth Circuit in consolidated Case Number 90-3874. On May 6, 1991, the Fifth Circuit granted the Government's motion to stay the appellate proceedings in Case Number 90-3874 pending disposition of *Ayers* before this Court.

SUMMARY OF ARGUMENT

Petitioner has failed to establish any justification whatsoever for the issuance of a writ of mandamus in this matter. On its face, the Attorney General's Petition does not even remotely satisfy the requirements for the issuance of an extraordinary writ.

First, Mr. Guste has failed to show that adequate relief cannot be had in any other form or from any other court. In fact, the Attorney General's appeal of the final judgment he seeks to vacate through his Petition has been expedited and scheduled for oral argument on July 8, 1991 before a panel of Fifth Circuit judges. This fact alone warrants the denial of Mr. Guste's Petition. *See* In *re Sindram*, ___ U.S. ___, 111 S.Ct. 596, 597 (1991); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980).

Second, Petitioner cannot establish that he possesses a clear and indisputable right to the issuance of a writ of mandamus. The district court properly decided the representation issue in the context of both the Title VI case and the removed state action. Mr. Guste has failed in his efforts to show that the district court exceeded the confines of its prescribed jurisdiction by making the determinations and, thus, his attempts to secure the extraordinary remedy of writ of mandamus must also fail. *See Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953). An abundance of law and authority supports the district court's recognition of John N. Kennedy and Joseph J. Levin, Jr. as the proper representatives of the State of Louisiana in this litigation. Indeed, federal law, Louisiana case law, the Louisiana constitution, and Mr. Guste's own conduct in the case demanded such a result.

As to the Attorney General's claims regarding the removed state action, the district court correctly recognized that Mr. Guste's state court petition constituted nothing more than a desperate attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination. *United States v. Louisiana*, 751 F. Supp. at 615. Moreover, despite the Attorney General's assertion that his state court petition presents only state issues, the only facts included in the petition stem from the Title VI action. Thus, Mr. Guste's state court petition clearly sought a

determination of who may practice before the district court and, specifically, who may represent a litigant in a particular federal case. Certainly, only the federal court in which the federal action was pending could make this determination and, thus, the district court acted completely within its jurisdiction by preventing Mr. Guste's manipulative attempt to interfere with the court's proceedings.

REASONS FOR DENYING THE WRIT

A. Petitioner Has Failed To Establish Circumstances Justifying The Extraordinary Remedy Of Writ Of Mandamus.

This Court has instructed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *In re Sindram*, ___ U.S. ___, 111 S.Ct. 596, 597 (1991). *See In re McDonald*, 489 U.S. 180, 184-85 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (citing *Will v. United States*, 389 U.S. 90 (1967)). "Only exceptional circumstances, amounting to a judicial ursurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.*, 449 U.S. at 35. *See Will v. United States*, 389 U.S. at 95. As this Court observed in *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976), the writ of mandamus "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 426 U.S. at 402 (quoting *Will v. United States*, 389 U.S. at 95).

To ensure that a writ of mandamus will issue only in extraordinary circumstances, this Court has required that a petitioner seeking issuance have no other adequate means to attain the relief he desires. *In re Sindram*, ___ U.S. at ___, 111 S.Ct. at 597. *See Allied Chemical Corp.*, 449 U.S. at 35 (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)); *Kerr*, 426 U.S. at 403; Sup. Ct. R. 20.1. Moreover, this Court has required that the petitioner satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). *See Kerr*, 426 U.S. at 403. Showing that a district court committed error

does not satisfy this burden. *Allied Chemical Corp.*, 449 U.S. at 35. Although a simple showing of error may suffice to secure a reversal on direct appeal, to obtain the extraordinary remedy of writ of mandamus, a petitioner must show exceptional circumstances amounting to judicial usurpation of power. *Id.* (citing *Will v. United States*, 389 U.S. 90). The Attorney General has failed to satisfy his burden in this regard and, thus, no writ should issue.

1. Petitioner Has Failed To Satisfy His Burden Of Establishing No Other Adequate Means To Attain The Relief He Seeks.

On its face, the Attorney General's Petition for Writ of Mandamus does not even remotely satisfy the requirements for the issuance of an extraordinary writ. Mr. Guste has made no showing that "adequate relief cannot be had in any other form or from any other court." *See In re Sindram*, ___ U.S. at ___, 111 S.Ct. at 597 (quoting Sup. Ct. R. 20.1).

The Attorney General's bald and inflammatory assertion that this "Court's power to issue the extraordinary writ of mandamus is General Guste's last hope for an immediate and adequate remedy" (Petition at 6), is simply not true. As stated above, Mr. Guste has appealed the district court's final judgment on the representation issue. Oral argument in that appeal has been scheduled for July 8, 1991. Thus, any error committed by the district court can be corrected by the Fifth Circuit. Moreover, with the granting of the Attorney General's request for expedited appeal, it is likely that the issue on appeal will be determined by the Fifth Circuit prior to final disposition of the matter in this Court. Further, Mr. Guste's motion to certify questions to the Louisiana Supreme Court, still pending before the Fifth Circuit, constitutes another possible avenue of relief for Mr. Guste. Therefore, despite the Attorney General's vociferous contentions, the extraordinary remedy of mandamus is clearly not his last hope.

The primary authority offered by Mr. Guste to support his Petition for Writ of Mandamus, *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1 (1st Cir. 1984), is neither controlling nor on point. That action arose when the President of the Senate of Puerto Rico sought to compel the Commonwealth's governor to produce documents for a Senate investigation of alleged police misconduct. *See*

Agosto v. Barcelo, 594 F. Supp. 1390, 1391 (D. P.R. 1984). The Commonwealth's governor removed the case to federal court and the United States District Court for the District of Puerto Rico refused the Senate's request for remand. *Id.* at 1399. Treating the Senate's appeal as a request for writ of mandamus, the United States Court of Appeals for the First Circuit ("First Circuit") found that the action had been improperly removed and that the case was appropriate for the issuance of a writ of mandamus. *Hernandez-Agosto*, 748 F.2d at 4. The First Circuit stressed, however, that it was the *combination* of jurisdictional error and the possibility of harm through further delay which warranted issuance of the writ. *Id.* at 5. The court opined that because the authority of the Senate to conduct the investigation at issue expired with the expiration of the session itself (approximately two months from the date argument was held before the First Circuit), "even a short delay while the district court decides the merits threatens to deprive the Senate of whatever legal remedy the law may give it." *Id.*

Unlike the petitioner in *Hernandez-Agosto*, the Attorney General cannot establish any possibility of harm through further delay. Indeed, Mr. Guste offers no explanation as to how he might be harmed but, rather, makes only obscure references to the need for immediate action.

Respondents are perplexed by the Attorney General's statement that unless the issue is determined immediately, "Louisiana will continue to speak with two voices in an agonizing field which Your Honors have recently agreed to review in the Mississippi case.[ ]" Petition at 2. Mr. Guste offers no explanation of the connection he seems to make between the Mississippi Title VI litigation and the need for immediate relief from the district court's determinations on the issue of representation of the State in the Louisiana Title VI litigation. Indeed, because the district court ruled in favor of the defendants on the merits of the Louisiana Title VI litigation, the position supported by both the Attorney General and the Governor, Mr. Guste's statement that "Louisiana will continue to speak with two voices" makes no sense. Further, since the Fifth Circuit recently stayed the appeal of the final judgment in the Louisiana Title VI litigation, pending this Court's determination in *Ayers*, the Attorney General cannot credibly argue that the denial of this Petition will prejudice him in that appeal.

Moreover, while he speaks of the need for an immediate determination, Mr. Guste's own past actions belie his new found sense of urgency. Prior to his most recent filings, the Attorney General pursued his appeal to the Fifth Circuit in a manner far from expeditious. Not only did Mr. Guste fully utilize the forty day briefing period provided to appellants, he sought and received an additional thirty-one days to prepare his appellate brief. Thus, the Attorney General required a total of seventy-one days to complete his seventy-two page brief on this issue .

In short, Mr. Guste has offered no foundation to support his claim that the issuance of a writ of mandamus constitutes his last hope for an immediate and adequate remedy. Rather, his pending appeal before the Fifth Circuit, recently expedited and scheduled for oral argument on July 8, 1991, is clear evidence that the Attorney General's claim in this regard is simply not true.[13]

2. Petitioner Has Failed To Establish A Clear And Indisputable Right To The Issuance Of A Writ Of Mandamus.

Mr. Guste cannot show that the district court exceeded its prescribed jurisdiction by designating John N. Kennedy and Joseph J. Levin, Jr. as counsel for the State in litigation pending before that court. Thus, Mr. Guste does not have a clear and indisputable right to the issuance of a writ of mandamus. *Allied Chemical Corp.*, 449 U.S. at 35. *See Bankers Life & Casualty Co.*, 346 U.S. at 384. The district court was empowered to decide the representation issue in the context

[13] The Attorney General's Petition, filed in the face of well-settled, applicable Supreme Court authority, has succeeded only in multiplying the proceedings in this matter and in unnecessarily and vexatiously increasing costs to Respondents and to the taxpayers who fund the operation of the judicial process. Mr. Guste's behavior in this regard is even more egregious in light of the fact that, while asserting dire circumstances and claiming that mandamus constitutes his last hope, the Attorney General failed to inform this Court of either his appeal of the district court's judgment or his Motion to Expedite and to Certify, both pending before the Fifth Circuit, and further failed to inform the Fifth Circuit of his Petition for Writ of Mandamus pending before this Court. This type of behavior has resulted in the imposition of sanctions against parties and counsel. *See, e.g., In re Sindram*, ___ U.S. ___, 111 S.Ct. 596 (1991) (Court has duty to deny *in forma pauperis* status to those individuals who have abused the system); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (Court may impose sanctions against party and counsel who willfully abuse the judicial process).

of both the Title VI case and the removed state action. The district court based its decision on several sources of law applied to the pertinent facts in the case. *See United States v. Louisiana*, 751 F. Supp. at 611-14. In reaching its conclusions of law, the district court lawfully and properly exercised its statutory and inherent authority and, thus, the issuance of a writ of mandamus is wholly unwarranted.[14]

a. The Determination Of The Right And Manner Of Counsel Participation Before A United States District Court Constitutes A Federal Question.

The federal district court properly exercised original jurisdiction over the issue of representation of the State in litigation pending before the court. 28 U.S.C. Section 1331 empowered the court to determine the representation issue pending before it in both the Title VI case and the removed state action. That section provides that federal district courts possess original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. Further, removal was appropriate under those same grounds where, pursuant to 28 U.S.C. Section 1441,

> any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

---

[14] In his Supplement to Petition for Mandamus (dated May 22, 1991), Petitioner offers a brief discussion of the recent decision in *Primate Protection League v. Tulane Ed. Fund*, 59 U.S.L.W. 4424 (U.S. May 20, 1991) (No. 90-89). Mr. Guste fails, however, to offer any explanation of how that decision relates to his instant request. While *Primate Protection League* sets forth the appropriate procedure to be followed in actions improperly removed to federal court, the limited issue considered by the Court in that case was the scope of the federal statute that permits removal to federal court of civil suits filed in state court against "[a]ny officer of the United States or any agency thereof, or person acting under him" challenging any act under color of such office. 28 U.S.C. Sec. 1442(a)(1). Construing the statute, the Court concluded that Section 1442(a)(1) does not grant removal authority to federal agencies, but only to federal officers. 59 U.S.L.W. at 4425, 4426. Neither the factual pattern nor the issues presented in *Primate Protection League* bears any similarity or relevance whatsoever to the instant action. Accordingly, the Attorney General's reliance on the decision is entirely misplaced.

> district and division embracing the place where such action is pending.

28 U.S.C. Sec. 1441(a).[15]

i). The District Court Possessed Statutory And Inherent Judicial Power To Decide The Issue.

The Attorney General's efforts in both the underlying federal case and the state court action sought to disrupt the orderly resolution of the litigation by seeking to remove counsel for the State. The district court appropriately exercised its statutory and inherent judicial authority and designated the Governor's counsel as sole trial attorneys for the State in the Title VI litigation. 751 F. Supp. at 620. The court's action in this regard is well supported under federal law.

It is axiomatic that a federal district court has both the federal statutory and inherent judicial power to resolve who may be permitted to appear before it, as well as how appearances before the court may be conducted. *See Frazier v. Heebe*, 482 U.S. 641, 645 (1987); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985); 28 U.S.C. Sec. 1654. This authority is particularly vital when the conduct of counsel may obstruct the orderly administration of justice. *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619-20 (11th Cir. 1983); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). Absent such authority and discretion, district courts would fall victim to the whims of counsel attempting to manipulate the court's docket to suit their own agenda. In this case, for example, after lengthy proceedings on the issue of remedy and irrespective of all the judicial time and expense previously in-

---

[15] While the district court did not find it necessary to rely upon the alternate jurisdictional grounds found at 28 U.S.C. Section 1441(c), had the court found that there were also issues of state law presented in the Attorney General's state court petition, the removal would have been proper nonetheless under that section. Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein . . . .

28 U.S.C. Sec. 1441(c).

curred, the Attorney General attempted to obstruct the orderly resolution of the case by seeking to change the State's position on remedy and removing its counsel at the last minute, after the case was virtually over. Recognizing the Attorney General's tactics, the district court responded accordingly by denying his motion. *United States v. Louisiana*, 751 F. Supp. at 615.

As to the Attorney General's claims regarding the removed state action, the district court correctly perceived that Mr. Guste's state court petition constituted no more than an eleventh hour attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination. *Id.* Even Mr. Guste's attempt to draft a state court complaint that would escape federal jurisdiction could not succeed in the face of substantial authority prohibiting such thinly-veiled efforts to place federal issues before state courts. *See, e.g., Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (affirming finding that respondents had attempted to avoid removal jurisdiction by "artfully" casting their federal law claims as state claims); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) ("[a] party may not fraudulently evade removal by drafting a complaint so that the true purpose of the law suit is artfully disguised."); *Nowling v. Aero Services Intern., Inc.*, 734 F. Supp. 733, 737 (E.D. La. 1990) (same). Mr. Guste's petition sought to persuade a state court to issue an injunction that would have had the effect of enjoining a federal court from proceeding with a matter remanded to it by the Fifth Circuit.[16]

Even a cursory reading of the Attorney General's state court petition reveals that he sought a determination and an injunction by the Louisiana civil district court that Respondents could not appear in the federal action. As the Attorney General stated, his request for relief sought an injunction:

> enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting . . . . as the lawfully authorized legal representatives of the State of Louisiana . . . , and *in particular* enjoining to act and identify [sic]

[16] The fact that the Fifth Circuit ordered the lower court to consider the issue of the State's representation indicates that the district court did indeed have jurisdiction over the matter and was the proper forum for such a determination. *See* Order, *United States v. Louisiana*, No. 89-3637 (dated Aug. 28, 1990) (Appendix at 18a).

> themselves as the legal representatives of the State of Louisiana in *U.S.A. v. Louisiana*, No. 80-3300 . . . .

Petition for Declaratory and Injunctive Relief (Petitioner's Appendix at 77a)(emphasis supplied). Like the plaintiffs in *Nowling v. Aero Services*, the Attorney General has claimed that his state court pleading raised solely issues of state law, but "[t]o believe that would be to substitute naivete for common sense." 734 F. Supp. at 737.

If anything, Mr. Guste made this even more of a federal question by seeking injunctive relief from a state court as to who may appear before the federal court in the Title VI action. While Congress has authorized courts of the United States to restrain state court proceedings in special circumstances, state courts are completely without power over federal court proceedings. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977). *See Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964); *Meridian Investing & Development Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 372 (5th Cir. 1980). This well-established rule is in no way relaxed because the prohibition is addressed to the parties rather than the federal court itself. *Felter*, 434 U.S. at 17. *See Donovan*, 377 U.S. at 413. The Attorney General's state court petition, though not addressed directly to the district court, constituted a transparent attempt to enjoin the district court from proceeding with a matter remanded to it by the Fifth Circuit. The district court correctly prevented Mr. Guste's manipulative attempt to interfere with the court's proceedings. *See* 751 F. Supp. at 615.

Moreover, despite the Attorney General's assertion that his state court petition presents only state issues, it was Mr. Guste who brought these very issues before the United States District Court in his August 3, 1989, Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel (Appendix at 37a) and before this Court in his August 16, 1989, Supersession Motion (Appendix at 40a).[17] Placing the question of who represents the State before the

[17] The plain language of his Supersession Motion reveals that at that time, the Attorney General was quite willing to have a federal court entertain both his federal and state law arguments pertaining to the representation issue. Although he alludes to the authority of the Supreme Court to certify the representation question to the Louisiana Supreme Court, it was not until much later that Mr. Guste, perhaps anticipating the likelihood of an adverse ruling by the district court, began to assert that the representation issue presented only state law concerns and should be deter-

(Footnote continued on next page)

United States District Court and before the highest federal court, Mr. Guste could not be allowed to later disclaim the jurisdiction of the district court over the very same issue. The very fact that the Attorney General asked the district court to issue an order accepting his designation of counsel for the State constitutes an admission by Mr. Guste that the district court is empowered with authority to determine who may practice before it.

Simply put, the Attorney General sought a determination from a state court of who may practice before the federal district court and who may represent a litigant in a particular federal case. That is a matter for determination only by the federal court in which the federal action was pending and certainly provides federal jurisdiction sufficient for removal of that issue.

ii). Federal Common Law Supports The District Court's Ruling.

In addition to federal statutory and inherent judicial power, federal common law provided the district court with jurisdiction over the subject matter at issue. Applying the common meaning of the word "law," this Court has concluded that Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory or constitutional origin. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 n.5 (1959).

Federal common law provides, under circumstances such as exist here, that a federal court may indeed decide that a state's governor is the proper spokesman for the state in litigation to which the state is a party. *See, e.g., Graddick v. Newman*, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990) (Westlaw, 1990 WL 265971) (determining that the Governor of Louisiana, not its Attorney General, is the sole representative of the State in legal proceedings involving the State). As the Attorney General is well aware, and contrary to his assertions (Petition at 15),

---

(Footnote 17 continued)

mined only in a state forum. *See* Opposition to Motion for Status Conference (dated Apr. 18, 1990) (brief reference to certification and "new 'federalism'"); Opposition to Motions to Remand, *United States v. Louisiana*, No. 89-3637 (dated May 23, 1990) (extended assertion that issue is governed solely by state law).

Graddick has been relied upon by Respondents in this and other litigation to show that federal courts have made determinations such as the one at issue without resorting to state law.[18] For purposes of determining federal question jurisdiction, the value of *Graddick* and *Williams* lies as much in the recognition by federal courts of their authority and, indeed, responsibility to render decisions on this subject as in the substance of the courts' decisions themselves.

In *Graddick v. Newman*, 453 U.S. 928 (1981), this Court ruled that the Governor of Alabama and not the state's attorney general had authority to establish and articulate the position of Alabama in a case involving the stay of a federal district court order pertaining to state prisons. The Alabama attorney general sought to stay a district court order requiring the release of approximately 400 state prison inmates, prior to the expiration of their sentences, as part of the remedy for the state's long-litigated failure to operate its prison system in compliance with constitutional standards. Though a named party in the case, the state attorney general had participated infrequently in the litigation and had not appeared in the action at all for a four-year period. 453 U.S. at 929, 931. During that time, Alabama's primary representative in the lawsuit had been Governor Fob James. *Id.* The governor opposed the attorney general's application for a stay, arguing that he, not the attorney general, properly represented Alabama's interests, much as Governor Roemer has done in this action. *See id.* at 934.

The Court denied the attorney general's application for a stay, because, according to Justice Powell, the attorney general lacked standing inasmuch as Alabama law had vested responsibility for the state's prison system in the governor. *Id.* at 934. Justice Powell's opinion further noted that the Court could not grant the extraordinary, equitable relief requested by the attorney general when he had sought such relief "with unexplained tardiness." *Id.* at 936.[19]

[18] The Attorney General's stance on *Graddick* continues to perplex Respondents, particularly in view of Mr. Guste's recent Motion to Expedite Appeal and to Certify. In that motion, the Attorney General himself cites to a case in which the Fifth Circuit makes the very determination he claims is beyond the jurisdiction of federal courts. *See* Motion to Expedite and to Certify (Appendix at 2a) (citing *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976))

[19] Attempting to minimize the significance of *Graddick*, the Attorney General relies exclusively on the separate opinion written by Justice Rehnquist and ignores completely the opinion by Justice Powell. Petition at 15-16. Once again, Mr. Guste

(Footnote continued on next page)

The instant case is virtually indistinguishable from *Graddick*. Governor Roemer and his counsel actively participated in the litigation as the representatives of the State of Louisiana and all of its citizens, while the Attorney General at times was largely and noticeably absent from the proceedings. The fact that the Alabama attorney general is the state's chief legal officer under state law[20] did not deter the Supreme Court from determining that the state's governor was the proper representative of the state, particularly where, as in this case and *Graddick*, the governor is vested with authority and, indeed, responsibility over the institutions at issue. *See Graddick*, 453 U.S. at 534; *see, e.g.*, La. Const. art. VIII, secs. 5-7; La. Rev. Stat. Ann. Secs. 17:1453, 17:1831, 17:1851. If anything, the Alabama attorney general was in a stronger position than Mr. Guste because the Alabama attorney general was a named party defendant to the action, not, like Mr. Guste, merely co-counsel to a defendant. *See* 453 U.S. at 929-30. Thus, as exemplified in *Graddick*, federal common law supports the district court's decision in this case, both as to the court's authority to consider the issue in the first instance as well as to the substance of Judge Schwartz's determination.

b. Procedural And Ethical Considerations Barred Mr. Guste From Pursuing His Course of Action.

The district court was also empowered to direct Mr. Guste's withdrawal from the case based on his willful violation of procedural and ethical standards. *United States v. Louisiana*, 751 F. Supp. at 616. The Attorney General's actions in the litigation before the district

---

(Footnote 19 continued)

perverts the relevance of *Graddick* to this case, that federal courts, including this Court, have not shied away from this issue. Furthermore, while Justice Powell focuses on the Alabama attorney general's behavior and conduct, Justice Rehnquist appears to concentrate on the attorney general's rights as a *party* to the litigation. In determining the representation issue in the context of the Louisiana Title VI litigation, the district court was not faced with a situation in which the Attorney General sought to assert his rights as a party. Rather, the district court was required to determine the proper representative of the State in a particular litigation in which the Attorney General had absented himself, leaving the representation of the State to other counsel, only to attempt much later to resume control of the State's representation while at the same time trying to change the State's position on remedy.

[20] *See* Alabama Code Section 36-15-21 (1975).

court demonstrated conclusively that he not only acquiesced in the representation of the State by John N. Kennedy and Joseph J. Levin, Jr., but that he affirmatively furthered that representation as well. Mr. Guste generally failed to take an active role in the remedy phase of the case and moved Mr. Kennedy and Mr. Levin into the case as State's counsel to conduct the State's defense. Such a deliberate act by Mr. Guste to secure the Governor's representation of the State can only be viewed as intentional and purposeful, rather than mere acquiescence by the Attorney General in that representation. Having failed to object to the Governor's representation of the State, and in fact, having designated the Governor's special counsel, John N. Kennedy, as lead trial counsel, the Attorney General could not be allowed by the district court to assume control over the State's participation in the case, particularly under circumstances where the Attorney General's sole motivation was to change the position asserted by the State (and relied upon by all the parties) during trial, recommended by the Special Master, and adopted in material part by the court.

Mr. Guste was both procedurally and ethically barred from pursuing such a course in the litigation. As this Court has declared, it is an elementary principle of civil procedure that "suitors may not maintain a position here which conflicts with that taken below." *Seney v. Swift Co.*, 260 U.S. 146, 149 (1922). *See Mongoose Gin Co. v. United States*, 331 F.2d 483, 484 (5th Cir. 1964) (new allegations, not raised before the trial court, may not be asserted as a basis for reversal of the trial court's judgment); *Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir. 1962) (defendants' failure to contest allegations "*prior to judgement*" prevents them from doing so after judgment is rendered) (emphasis in original). That is precisely what the Attorney General has attempted to do since August of 1989, as evidenced by the plain language of his Notice to Join (Appendix at 7a). Moreover, under the most basic standard of fair play, Mr. Guste could not be allowed to abandon the State's position after trial and take an adverse position before the district court or any other court.

Despite the Attorney General's attempts to distinguish the case (Petition at 21 n.9), *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 172 Cal. Rptr. 478, 624 P.2d 1206 (Cal. 1981), remains illustrative of the ethical quagmire into which Mr. Guste stepped in the action below. In *Deukmejian*, the California attorney general counseled the

California governor to sign a piece of legislation (an employment relations act) and then advised the state agency charged with implementing the action after the legislation was challenged in court. 29 Cal. 3d at 154, 172 Cal. Rptr. at 479, 624 P.2d at 1207. In a legal about-face, however, the attorney general then sought a writ of mandate from an appellate court against the governor and the state agency to prohibit them from enforcing that statute. *Id.*

The California Supreme Court held that "no constitutional, statutory or ethical authority" existed to support the attorney general in "acting adversely to the position of his statutory clients [the governor and the state agency]." 29 Cal. 3d at 155, 156, 172 Cal. Rptr. at 479, 480, 624 P.2d at 1207, 1208.[21] In reaching its decision, the court relied on Rule 5-102 of the California State Bar Association Rules of Professional Conduct ("California Rules"), which is identical in its meaning to Rule 1.9 of the Louisiana Rules of Professional Conduct ("Louisiana Rules"), and Rule 1.9 of the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules")[22] , and which provides:

> A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.
>
> * * *

---

[21] The Attorney General's efforts to diminish the applicability of *Deukmejian* fall short. Contrary to Mr. Guste's assertions (Petition at 21 n.9), *Deukmejian* emphasizes that in a situation such as that imagined by Mr. Guste, the correct course of action for an attorney general is to withdraw as counsel, rather than take a position adverse to the state client. 29 Cal. 3d at 153, 172 Cal. Rptr. at 481, 624 P.2d at 1209.

[22] Both the ABA Model Rules and the Louisiana Rules state:

> A lawyer who has formerly represented a client in a matter shall not thereafter;
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former clients unless the former client consents after consultation . . .

ABA Model Rule 1.9; Louisiana Rules of Professional Conduct Rule 1.9.

> A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

In the case at hand, Mr. Guste exceeded the bounds of ethical propriety and fair play to an even greater extent than did the California attorney general in *Deukmejian*. Mr. Guste, along with co-counsel, formally represented the State in the trial court. As noted above, the California Rules, the Louisiana Rules and the ABA Model Rules all contain the same ethical prohibition against taking a position adverse to a client. Moreover, all parties to this action, including the Government, relied throughout the remedial phase of the case upon the State's position in support of the single governing board and the other aspects of the State's desegregation plan. The entire litigation approach taken by the parties would have been markedly different had the position belatedly advocated by Mr. Guste been asserted at trial.

Mr. Guste's ethical breach in this regard is also cognizable under the Local Rules of the Eastern District of Louisiana, which provide that the district court may take appropriate disciplinary action for, *inter alia*, violations of the Louisiana Rules of Professional Conduct. *See* Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, Rule II (Appendix at 44a). Thus, the district court was empowered to order that Mr. Guste discontinue his "representation" of the State in Civil Action Number 80-3300 based on his violation of the State's Rules of Professional Conduct, as incorporated into the court's Local Rules.[23]

The Attorney General's conduct in this action, particularly during the proceedings he brought before this Court, constituted further violations of the Louisiana Rules of Professional Conduct, which prohibit an attorney practicing in the State from knowingly making false statements of material facts or engaging in similar conduct while representing a client. *See* Louisiana Rules of Professional Conduct, Rules 3.3, 4.1 and 8.4 (Appendix at 45a).

---

[23] Mr. Guste also attempts to circumvent Respondents' allegations regarding the Attorney General's unethical conduct in this case by drawing an inapplicable distinction between private and public attorneys. *See* Petition at 21 n.9. The authority cited by Mr. Guste is premised on the assumption that the attorney general is the sole legal representative of the state. Such is not the case in Louisiana.

In pleadings filed with this Court, Mr. Guste defended his appeal of the district court's Remedial Order and his request for a stay of that Order by claiming that he "did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court]." *See* Supersession Motion (Appendix at 43a). The absolute falsity of Mr. Guste's assertion regarding the single board issue is easily exposed upon review of that remedy's substantial history in the case. For instance, in 1988, the district court suggested on at least two occasions that a unified governing board was likely to be part of the remedy fashioned in this case. *See United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988); Opinion and Order (dated Nov. 22, 1988). In fact, the Attorney General's own argument in this action admits that he knew, at an early point in the remedial phase, the Governor's position on remedy. Specifically, in his Petition, Mr. Guste states that as an "accommodation to Governor Roemer," he "permitted the Governor's counsel to advocate a single-board remedy before the district court as an alternative remedy under protest . . . ." Petition at 21 n.9. This admission emasculates the Attorney General's prior claims of ignorance as to the Governor's proposed remedy.[24] Moreover, this "accommodation" was never communicated to the Governor, Mr. Kennedy, Mr. Levin, counsel for the Regents, counsel for the Trustees, counsel for LSU, the district court, or any other party to the litigation. Indeed, this assertion by the Attorney General is nothing more than another transparent effort to justify his behavior.

Mr. Guste's explanation for his belated re-involvement in the litigation is also inconsistent with the explanation he offered to the district court in the Attorney General's Notice to Join, in which Mr. Guste claimed that he was duty-bound to provide a defense of the State's four-board, seventy-member governance structure and the laws creating it. *See* Notice to Join (Appendix at 7a). Certainly, to the extent such a duty was present, it existed since the beginning of the remedy phase of the case, months before Mr. Guste belatedly re-entered the case.

---

[24] Additionally, the overwhelming media attention given to the proposed abolition of the four boards and the creation of a single board renders Mr. Guste's assertion all the more incredible. Scores of articles were published in newspapers around the State regarding the proposed creation of a single board. *See* Appendix at 47a.

Significantly, Mr. Guste did not argue to the district court, as he did to this Court, that he was "surprised" by the Remedial Order because, as the Attorney General knew, the district court was familiar with Mr. Guste's past participation in the case, his knowledge of the State's position on remedy and, indeed, his acquiescence in that position. This Court, however, did not have the extensive history with the case as did the district court and, therefore, must have seemed to be a safe forum for Mr. Guste to claim that he did not know and could not reasonably be expected to have known that a single board might have been a part of the district court's remedy. Since that time, Mr. Guste has offered no explanation for his prior statements before this Court.

Such a misrepresentation is forbidden by the State's Rules of Professional Conduct, which require candor in an attorney's professional conduct. See Louisiana Rules of Professional Conduct, Rules 3.3, 4.1 and 8.4 (Appendix at 45a). Mr. Guste's violation of these rules provided the district court with additional grounds on which to order the Attorney General's withdrawal from the action. *United States v. Louisiana*, 751 F. Supp. at 616.

c. Louisiana Case Law And The Louisiana Constitution Reject Mr. Guste's Attempt To Exercise Legal Supremacy Over The Governor.

The district court correctly ruled that the Attorney General waived his rights as a matter of federal law. 751 F. Supp. at 617. In reaching this conclusion, it was not necessary for the district court to address issues of state law. Even so, the district court was empowered to conclude that as a matter of clear Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State in this action and, as such, may determine the State's course in this litigation. The Attorney General's reliance upon the doctrines of abstention and comity is inappropriate under these facts. As the district court recognized, were the issue of representation before the district court solely a question of state law and were the state law not so clear, abstention by the district court under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), arguably could have been appropriate. 751 F. Supp. at 617 n.6. *See also Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certifying an unsettled issue of state law to the Massachusetts Supreme Judicial

Court). As the district correctly recognized, however, it was faced with neither condition.

The case law in Louisiana is as consistent at it is clear that the Attorney General is not vested with supremacy over the Governor in articulating the State's position in litigation such as the instant action. The case of *State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So. 2d 756 (La. App. 1st Cir. 1983), demonstrates that the Attorney General's title under the Louisiana Constitution of 1974 as the State's "chief legal officer" does *not* mean that he replaces the Governor as spokesman for the State whenever the Attorney General attempts to enter a legal proceeding.[25] In Texaco, the Governor opposed a claim by a special counsel of the State for the direct payment of his attorney's fees by the trial court. *Id.* at 757. The Attorney General (then and now, William J. Guste, Jr.) responded by challenging the Governor's position. *Id.* at 758.

The Louisiana trial and appellate courts in *Texaco* refused to treat the Attorney General's support of the special counsel's position and the payment of his legal fees as mooting the controversy. Instead of treating the Attorney General as the definitive spokesman for the interests of the State of Louisiana, both courts ruled in favor of "the State's position" as articulated by the Governor. *Id.* at 759.[26]

Again, Mr. Guste misreads the holding in *Texaco* and its applicability in this case. *See* Petition at 23 n.10. *Texaco* has been cited consistently by the State and the district court for the proposition that Louisiana state courts have found that the Governor is the appropriate voice for the State in important litigation such as the instant action. Mr. Guste's discussion of *Texaco* reveals his continued desire to be both the attorney and client, simultaneously representing the State while dictating the State's position in this litigation. This argument is patently flawed, represents a fundamental misunderstanding of the

---

[25] *See* Article IV, Section 8 of the Louisiana Constitution of 1974 (Appendix at 59a).

[26] The dispute in *Texaco* was eventually settled and compromised and, on a joint motion and order for dismissal and release of the funds deposited in the registry of the court, the Louisiana Supreme Court dismissed the appeal and intervention. *State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So. 2d 557 (La. 1984). It was only with the Governor's approval that the case was dismissed, thus lending further support to the district court's holding that the Governor sets the State's policy in the litigation.

attorney-client role and relationship and has no support whatsoever under Louisiana law.

Similarly, the Louisiana constitution refutes the Attorney General's claim of supremacy over the Governor. Mr. Guste relies heavily and almost exclusively upon the language of Article IV, Section 8 of the Louisiana Constitution of 1974, which designates the Attorney General as the State's "chief legal officer." However, the official records of the constitutional convention that drafted the 1974 state constitution demonstrate that the reference in Section 8 to the Attorney General as "the chief legal officer of the state" is merely an introductory truism and not a technical term indicating substantive or overall supervisory power. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI, at 624-26. *See* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765 (1977). The placement of Section 8, pertaining to the Attorney General, in Article IV of the 1974 Louisiana Constitution, pertaining to the judicial branch, indicates that the Attorney General is an executive officer functioning under the Governor. The Governor, in Article IV, Section 5(A), is designated "the *chief* executive officer of the state." La. Const. 1974 art. IV, sec. 5(A) (emphasis added) (Appendix at 59a).

Thus, any argument of purported supremacy which rests on the State constitution's designation of the Attorney General as the "chief legal officer of the state" must also deal with the incontrovertible fact that the same document designates the Governor "the chief executive officer of the state" with authority over all other executive officers, including the Attorney General. Recognizing this distinction, the district court correctly held that the state constitution "confers no substantive or overall supervisory power" on the office of the attorney general. *See United States v. Louisiana*, 751 F. Supp. at 619.

Mr. Guste has also acted contrary to the provisions of the Louisiana constitution in his efforts to supersede Respondents as attorneys for the State. To supersede an attorney for the State, as Mr. Guste attempted to do before the district court as well as this Court, the Attorney General must establish "cause." La. Const. art. IV, sec. 8 (Appendix at 59a). "Cause" means that the attorney "is not fulfilling his duties satisfactorily." Hargrave at 835.

The drafters of Louisiana's current constitution discussed the meaning of "cause" rather extensively. The records of the constitutional convention are replete with references to the need for some kind of misconduct or failure to act in order to justify the supersession. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI at 902-14. *See* Hargrave at 835-36. Mr. Guste's recently fabricated basis for seeking to supersede the Governor's counsel rests upon his objection to the legal positions taken by these attorneys on behalf of the Governor as to the proper court-ordered remedy. This is a matter of policy, not legal competency.

Mr. Guste alleges that Respondents engaged in a conflict of interest by participating in the remedial phase of the Title VI case. Petition at 18-19. In his Petition, the Attorney General suggests that because it was the State's position that no liability existed, the Governor's counsel were in conflict with the client, the State, by proposing a remedial plan. *Id.* at 19-20.[27]

In fact, the actions by the Governor's counsel in proposing a remedy in the Title VI case were pursuant to court order and in the best interests of the State. In stark contrast, the Attorney General's efforts to change the position of the State at the last minute, attempts to refute the remedy widely accepted by the majority of the defendants in the case as well as the court-appointed Special Master, without even offering a workable substitute, and general engagement in conduct that can most charitably be described as bizarre, can hardly be seen as acting in the State's best interest. Taken to its logical conclusion, the Attorney General's suggested course of action would place the Governor and his attorneys in contempt of court for failure to comply with court orders and procedures during the remedy phase. Mr. Guste has sought to have his choices predominate over those of the Governor and, as discussed, such a position lacks foundation in either the Louisiana case law or the Louisiana constitution.

---

[27] The Attorney General suggests that Respondents have violated ethical standards by continuing the representation of the State and, in this regard, makes totally unfounded allegations against Mr. Kennedy. *See* Petition at 8, n.6. These wholly unsupported allegations, typical of the type of argument made by the Attorney General throughout the litigation, obviously have no place in this proceeding.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Mandamus should be denied.

JOHN N. KENNEDY
Counsel of Record
Special Counsel to the Governor
Office of the Governor
4th Floor, State Capitol
P.O. Box 94004
Baton Rouge, Louisiana 70804
(504) 342-7015

JOSEPH J. LEVIN, JR.
JOHN M. FREEMAN
JOHANNA F. CHANIN
Colton and Boykin
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

Counsel For Charles E. "Buddy" Roemer, III, Governor
Of The State Of Louisiana, John N. Kennedy,
Joseph J. Levin, Jr. and Carla Calobrisi

Date: May 31, 1991

No. 90-1647

IN THE

Supreme Court Of The United States

October Term, 1990

IN RE: STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND
WILLIAM J. GUSTE, JR., IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,
Petitioner

APPENDIX TO BRIEF FOR RESPONDENTS CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, JOHN N. KENNEDY, JOSEPH J. LEVIN, JR. AND CARLA CALOBRISI IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JOHN N. KENNEDY
Counsel of Record
Special Counsel to the Governor
Office of the Governor
4th Floor, State Capitol
P.O. Box 94004
Baton Rouge, Louisiana 70804
(504) 342-7015

JOSEPH J. LEVIN, JR.
JOHN M. FREEMAN
JOHANNA F. CHANIN
Colton and Boykin
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

Counsel For Charles E. "Buddy" Roemer, III,
Governor Of The State Of Louisiana, John N. Kennedy,
Joseph J. Levin, Jr. And Carla Calobrisi

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

TABLE OF CONTENTS

PAGE

Motion to Expedite Appeal and to Certify Questions to the Louisiana Supreme Court 1a

Order Expediting Appeal (dated May 15, 1991) 6a

Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter and Amend Judgment (dated Aug. 2, 1989) 7a

S.U. Wrote Guste's Motion, The Shreveport Times, Oct. 17, 1989 . . . . . 9a

Jefferson Was Convenient For College Case, Guste Says, The Times-Picayune, Sept. 3, 1989 . . . . . 12a

Motion to Withdraw the "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record (dated Aug. 3, 1989) 14a

Order, *United States v. Louisiana*, No. 89-3637 (dated Aug. 29, 1990) 18a

Minute Entry (dated Sept. 21, 1990) 25a

Minute Entry (dated Oct. 4, 1990) 28a

Motion to Transfer and Consolidate (dated Oct. 12, 1990) 29a

Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel (dated Aug. 3, 1989) 37a

Excerpts from Motion to Supersede Counsel for State of Louisiana and to Strike Response in Opposition to State's Motion for a Stay Addressed to Individual Justice, *State of Louisiana ex rel. William J. Guste, Jr. v. United States*, No. 89-556 (U.S. dated Aug. 16, 1989) 40a

Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, Rule II 44a

Louisiana Rules of Professional Conduct, Rules 3.3, 4.1 and 8.4 . . . . . 45a

Newspaper Articles Referencing State's Support of Single Governing Board 47a

La. Const. art. IV, sec. 8 . . . . . 59a

La. Const. art. IV, sec. 5(A) 59a

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3864

STATE OF LOUISIANA EX. REL.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
PLAINTIFF-APPELLANT,

v.

CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, *et al.*,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court
for the Eastern District of Louisiana

MOTION TO EXPEDITE APPEAL AND TO CERTIFY QUESTIONS TO THE LOUISIANA SUPREME COURT

NOW COMES the State of Louisiana, *et al.*, William J. Guste, Jr., Attorney General, pursuant to Fifth Circuit Loc. R. 27.2.11 and pursuant to Louisiana Supreme Court Rule XII, Sections 1 and 2, and moves this Court for an expedited appeal and for certification to the Louisiana Supreme Court of the State Attorney representation questions presented herein, *viz.*:

1. Who is the State's legal representative in court – the Attorney General or the Governor?

2. Whether the State of Louisiana has an inherent sovereign right and interest in the legal subsistence and efficacy of its Constitution and to a full and good faith legal defense of those provisions of the Louisiana Constitution of 1974 declared invalid by the federal district court in *USA v. Louisiana*?

3. Whether it is unconstitutional under Louisiana Constitution of 1974, Art. IV, Sec. 8, for Governor ROEMER or special counsel KENNEDY, LEVIN, or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in litigation in either State or Federal court?

4. Whether Governor Roemer's counsel KENNEDY, LEVIN, and CALOBRISI's advocacy, purportedly on behalf of the State, of the imminent nullification of the State's own constitutional and statutory provisions was a professional conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct?

5. Whether KENNEDY, LEVIN, or CALOBRISI's purported representation of the State of Louisiana in *USA v. Louisiana* was *ultra vires* and unconstitutional from the date of their termination as attorneys for the State by Attorney General Guste on August 11, 1989, until the present day.

As good grounds therefor, Attorney General Guste shows:

A. On April 15, 1991 the United States Supreme Court granted certiorari in the *Mississippi Higher Education Desegregation Case, Ayers v. Mabus*, No. 90-6588 (consolidated with *United States v. Mabus*, No. 90-1205). The cloud cast over Attorney General Guste's authority to defend Louisiana's higher education system in federal court by the district court's published "Opinion and Order on the Representation of the State," 751 F. Supp. 609 (Oct. 30, 1990), which is the subject matter of this appeal, must be removed immediately. Otherwise Louisiana will continue to speak with two conflicting legal voices in violation of the Attorney General's exclusive constitutional prerogative as "chief legal officer" under Louisiana Constitution of 1974, Art. IV, Sec. 8, to represent the State as Sovereign in all judicial proceedings in which the State of Louisiana has an interest. Time is plainly of the essence here, since certiorari before judgment on the merits in No. 90-3874 is a litigation strategy that the State of Louisiana, *ex rel. Guste*, may wish to invoke under 28 U.S.C. §2101(e) and Rule 11 of the Rules of the Supreme Court of the United States.

B. We have fully briefed the attorney representation questions presented in No. 90-3464 and rely here on the authorities set forth in our Original Brief on the Merits. We think that Attorney General Guste's authority, denied by the district court below, "Simply is not an extremely close question." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976). But if we are wrong and doubt lingers in the mind of this Court, we respectfully request that the Fifth Circuit immediately certify to the Louisiana Supreme Court

pursuant to its Rule XII the vital, internal state law questions presented.

Only the Louisiana Supreme Court can definitively interpret and apply the State Constitutional and statutory provisions involved herein. Certification is especially appropriate here, given "the respective competence of the State and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959) (per Frankfurter, J.). *Accord*, *Massachusetts v. Feeney*, 429 U.S. 66, 67 (certifying to the Massachusetts Supreme Judicial Court the question whether the Attorney General may prosecute an appeal over the objections of the Governor). In the words of this Circuit's chief advocate of certification, Chief Judge John R. Brown:

> "In our vaunted federal-state structure, the states are supreme (short of constitutional factors) in their own field. The interests of the state are advanced by giving the state an opportunity authoritatively to declare its own law, in light of important underlying state policies. Friction between two sovereign judicial systems and the spectacle of diverse decisions (which all know will spawn unfortunate consequences even though by accident) is thereby avoided through certification."

Brown, *Certification – Federalism in Action*, 7 Cumberland L. Rev. 455, 465 (1977).

WHEREFORE, the State of Louisiana *ex rel.* Guste, Attorney General, respectfully prays that the appeal in No. 90-3864 be expedited, with accelerated briefing and hearing, and that the above-enumerated State Attorney representation questions be certified by this Court to the Louisiana Supreme Court as soon as possible.

Respectfully submitted,

/s/
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
LSBA Bar Roll No. 2248

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant
Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

PAUL R. BAIER
Special Assistant Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana
70804-9005
(504) 342-7013
Attorneys for the
State of Louisiana

CERTIFICATE OF SERVICE

I, William J. Guste, Jr., Attorney General of the State of Louisiana and appellant in this cause, hereby certify that, on the 24th Day of April, 1991, I served copies of the foregoing Motion to Expedite Appeal and to Certify Questions to the Louisiana Supreme Court to all opposing parties, by mailing a copy of same by United States mail, postage prepaid, addressed to the following:

Mr. John N. Kennedy
Special Counsel to the
Governor of Louisiana
Office of the Governor
Fourth Floor
State Capitol Building
P.O. Box 94004
Baton Rouge, Louisiana 70804

Mr. Joseph J. Levin, Jr.
Ms. Johanna F. Chanin
COLTON & BOYKIN
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007

Ms. Carla Calobrisi
ADAMS, McCULLOUGH
& BEARD
Attorneys-at-Law
2000 M Street, N.W.
Washington, D.C. 20036-3307

Baton Rouge, Louisiana, this 24th day of April, 1991.

/s/
WILLIAM J. GUSTE, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3864

STATE OF LOUISIANA, Ex. Rel.,
WILLIAM J. GUSTE, JR., Attorney General,
and WILLIAM J. GUSTE, JR., in his official
capacity as Attorney General for the State of Louisiana,
Plaintiffs-Appellants,

versus

BUDDY ROEMER, Charles E. "Buddy" Roemer, III,
Governor, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion to expedite the above captioned appeal is GRANTED.

IT IS FURTHER ORDERED that appellants' motion to certify questions to the Louisiana Supreme Court is CARRIED WITH THE CASE.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State of Louisiana to protect the Constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education - the Board of Regents, the Board of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of supervisors, in effect as special attorneys general to represent the interests of the respective boards and of the State of Louisiana, and hereby designates one said counsel, that of the Southern University Board of Supervisors, to represent the particular interests of the Attorney General in defending the constitutionality of the state's constitutional provision declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion

in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

William J. Guste, Jr.
ATTORNEY GENERAL
STATE OF LOUISIANA
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 2nd day of August, 1989.

Attorney of Record

SU wrote Guste's motion
School's lawyer wanted to represent state in case

by John Hill
Gannett News Service
Shreveport Times
9/2/89

BATON ROUGE-Southern University's lawyer wrote the original motion in which Attorney General William Guste last month asked federal district court judges in New Orleans to halt implementation of their college desegregation order, Guste acknowledged Friday.

In that motion, Guste attempted to name Southern's lawyer, state Sen. William Jefferson, D-New Orleans, as the state's – as well as Southern's – attorney in the appeal.

The motion was withdrawn within hours after one of the federal judges in the case phoned Guste to inform him that Jefferson had a professional conflict in the case.

Guste said he quickly rewrote and refiled the motion, this time designating Assistant Attorney General Winston Riddick as the state's lawyer in the case.

The conflict was that Southern had argued Louisiana operated an unconstitutional dual system of higher education, while the state's legal argument was that it did not. U.S. Judge Charles Schwartz phoned Guste to say Jefferson could not represent both sides of that issue, Guste said Friday.

Until Guste filed his motion, John Kennedy, a legal advisor to Gov. Buddy Roemer, had been the lead lawyer for the state in the complicated higher education desegregation case.

Since the Guste motion was filed Aug. 2, there has been a major argument between Guste and Roemer as to who represents the state in the case. That argument has now spilled over into the U.S. Supreme Court, where Kennedy and Guste are battling to be designated the official state attorney.

Gov. Buddy Roemer, contacted Friday, said he had long suspected Guste was acting at Jefferson's behest in the case. He said

he first noticed that the same postage meter was used to mail copies of Guste's motion and documents that came from Jefferson's New Orleans law office.

Roemer said Guste has never satisfactorily explained why he was trying to take over the case after allowing Kennedy and the governor's office to represent the state for so many months.

Jefferson, a New Orleans Democrat who is a graduate of Harvard Law School, said he wrote the motion for Guste's signature and review because the motion on behalf of the state had to be filed quickly on Aug. 2.

Guste acknowledged the original motion designated Jefferson as the lawyer representing the state in the appeal. But after Judge Schwartz phoned to inform him Jefferson had a conflict. Guste retracted the motion and filed a new one designating Assistant Attorney General Winston Riddick and others as the state's attorney.

"It was a mistake, and I acknowledge that it put Jefferson in a position of conflict. I then withdrew the initial motion and rewrote it," Guste said Friday. "Jefferson did not participate in the state's brief that was later filed."

Roemer, who has publicly and privately questioned why Guste entered the case after permitting Kennedy to be the lead lawyer for so many months, reiterated his dismay Friday when told Jefferson and Guste acknowledged their cooperation on the motion.

"I'm still not clear as to any reason why that happened," Roemer said. "It is mighty strange. I am at a loss. I have been for three weeks . . . This has not be [sic] good for our state, for higher education."

Until the federal judges issued their desegregation order in mid-July, Southern had sided with the U.S. Justice Department in the 15-year-old desegregation lawsuit against the state.

Southern had argued for more money to be spent at the state's historically black institutions.

But the court ignored that plea for money and instead ordered the various higher education boards — including Southern's board of supervisors — abolished and replaced by a single governing board. The court also ordered the Southern and LSU law schools merged.

Guste said he did not act any earlier than Aug. 2 because he felt certain someone else would appeal the court order on behalf of the state.

Jefferson said on July 31, he filed Southern's request for a new trial and an appeal to alter or amend the court order. On Aug. 1, Jefferson filed a motion asking for a delay in the implementation of the court's judgment, pending a hearing on the July 31 motions.

Lawyers for Grambling State University, the state's other predominantly black institution, filed similar motions.

On Aug. 1, the federal judges filed a notice that it questioned Grambling's and Southern's legal standing to appeal the case on behalf of the state, since no one from the attorney general's office appealed.

Jefferson said when he learned of the court's action on Aug. 2, he phoned Guste to discuss the matter with him. The attorney general had until midnight to file a motion of appeal.

Guste "couldn't believe the court was questioning Southern's legal standing," Jefferson said. "He called me back and asked when the last day for him to file was. It was that day. It had to be filed by midnight. At that point, his decision was to join in the motions filed by Southern since we had our motions already filed there. That should solve the standing issue."

Jefferson said he delivered the motion to Guste's New Orleans home. Guste signed it, and Jefferson filed that night.

In the original motion, Guste designated Jefferson as the lawyer for both Southern and the state, to argue the issue of whether the court order was constitutional.

Guste said Judge Schwartz then permitted him to refile the motion – which had not yet made it into the court record. In the second draft, Guste designed Riddick as the state's attorney.

Within 15 days, Southern reversed its 15-year legal position and argued that the state was not operating a dual system of higher education.

Roemer questioned why Guste so suddenly entered the case, when he had permitted Kennedy and Roemer to direct the desegregation case for months.

"He and I had met plenty of times; he had never raised the issue," Roemer said.

Jefferson was convenient for college case, Guste says

By The Associated Press

Convenience was the only reason state Attorney General William Guste asked Southern University's attorney to write a federal court motion to halt a disputed college desegregation order, Guste said Saturday.

Guste said he filed the motion on the last day to appeal the order, and state Sen. William Jefferson's office was closer to the federal courthouse where the papers had to be filed.

"As a convenience, he typed up a motion. That's as simple as it is," Guste said.

In the motion, Guste attempted to name Southern's attorney, Jefferson, D-New Orleans, as the state's lead attorney in the appeal. The motion was withdrawn within hours after one of three federal judges handling the case told Guste it posed a conflict of interest for Jefferson.

"It was a mistake and I acknowledge that it put Jefferson in a position of conflict," Guste said. "I then withdrew the initial motion and rewrote it. Jefferson did not participate in the state's brief that was later filed."

Until Guste filed his motion, there was no dispute that John Kennedy, a legal advisor to Gov. Roemer, was the state's lead attorney in the desegregation case.

Roemer supports the desegregation plan ordered by the federal judges.

Guste has said he opposes the plan as an infringement on the state's constitution.

Roemer and Guste each is seeking to have his attorney named the state's official attorney in the case by the U.S. Supreme Court, which will decide in October whether to hear a full appeal.

Guste said Jefferson's conflict of interest arose because Southern had once argued that Louisiana operated an unconstitutional dual system of higher education for whites and blacks, while the state argued it did not.

Southern dropped that longstanding argument after a three-judge panel ordered that one governing board for state colleges and universities should replace the Southern Board of Supervisors and other boards governing higher education. The judges also refused to specify how much the state must spend to improve traditionally black schools.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

MOTION TO WITHDRAW "NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT" AND MOTION TO ENROLL COUNSEL OF RECORD

I

On August 2, 1989, undersigned counsel filed a pleading entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment."

II

The Attorney General of the State of Louisiana now desires to withdraw that pleading and to substitute in its place a new pleading as evidenced by Attachment "A" which is attached hereto.

III

The Attorney General of the State of Louisiana further moves the court to enroll Mr. Kenneth C. DeJean, First Assistant Attorney General (#4816), Mr. Winston W. Riddick, Executive Assistant Attorney General (#11,263) and Mr. David Sanders, Assistant Attorney General (#11,696) as counsel of record for the State of Louisiana.

Respectfully submitted,

/s/

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 3 day of August, 1989.

/s/

Attorney of Record

ATTACHMENT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, et al.,

Defendants

CIVIL ACTION
NO. 80-3300
SECTION "A"

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State Of Louisiana to protect the constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education - the Board of Regents, the Board of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of supervisors, in effect as special assistant attorneys general to represent the interests of the respective boards and of the State of Louisiana. The Attorney General of Louisiana hereby designates Kenneth C. DeJean, First Assistant Attorney General (#4816), Winston W. Riddick, Executive Assistant Attorney General (#11,263), and David Sanders, Assistant Attorney General (#11,696), to represent the particular

interests of the Louisiana Attorney General and the State of Louisiana in defending the constitutionality of the state's constitutional provisions declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

/s/

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this ____ day of August, 1989.

Attorney of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 89-3637 & 90-3379

USDC #CA 80-3300 A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

versus

STATE OF LOUISIANA, ET AL.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant, the State of Louisiana (*ex rel.* William J. Guste, Jr., Attorney General of the State of Louisiana), to consolidate the captioned appeals, and the motion of appellants, the State of Louisiana (State), acting through its Governor, Charles E. "Buddy" Roemer, III, the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Trustees for Louisiana State Colleges and Universities, to consolidate the captioned appeals, are GRANTED; further that the alternative motions of said parties for leave to intervene in appeal No. 90-3379 are DENIED as moot.

IT IS FURTHER ORDERED that the motion of appellants, Grambling State University Alumni Association (GSUAA), for leave to intervene in appeal No. 90-3379 is DENIED as moot in view of the remand hereinbelow ordered (said denial being without prejudice to GSUAA's seeking to intervene in the district court).

IT IS FURTHER ORDERED that the motions to remand filed by the State of Louisiana, acting through its Governor, Charles E. "Buddy" Roemer, III, and by the United States of America, are GRANTED, and the cause is remanded to the district court so that it, in the first instance, may make the desired scheduling or implementation dates or related adjustments to its challenged orders and consider the pending matters concerning representation of the State, as well as act on matters ancillary or related to any of the foregoing, including any request for stay.

So that the intent of our orders in this respect may be better understood, we set forth the following background.

Our cause No. 89-3637 is the consolidation of various appeals to this Court challenging the three-judge district court orders, in its cause No. 80-3300, dated August 2, 1988, *see United States v. State of Louisiana*, 692 F.Supp. 642 (E.D. La. 1988), July 19, 1989, *see United States v. State of Louisiana*, 718 F.Supp. 499 (E.D. La. 1989), and August 4, 1989, *see United States v. State of Louisiana*, 718 F.Supp. 521 (E.D. La. 1989), and *United States v. State of Louisiana*, 718 F.Supp. 525 (E.D. La. 1989).[1] The appellants in our cause No. 89-3637 likewise directly appealed the district court's said orders to the United States Supreme Court. The Supreme Court on August 18, 1989 (Brennan, Marshall, and Blackmun, JJ., dissenting) stayed the enforcement of the district court's said judgment and orders "pending the timely docketing of appeals in this case and final disposition by the Court." *Southern University Board of Supervisors v. United States*, 110 S.Ct. 17 (1989); *Louisiana ex rel. William J. Guste, Attorney General of Louisiana v. United States*, 110 S.Ct. 18 (1989) (these stay orders extended the temporary stay entered by Justice White on August 14, 1989). On January 8, 1990, the Supreme Court entered orders, without opinion, that the direct appeals to it from the district court "are dismissed for want of jurisdiction." *Louisiana ex rel William J. Guste, Attorney General of Louisiana v. United States*, 110 S.Ct. 708 (1990); *Board of Supervisors of Southern University and Agricultural and Mechanical College v. United States*, 110 S.Ct. 708

[1] For the earlier history of this case, *see United States v. State of Louisiana*, 543 F.2d 1125 (5th Cir. 1976); *United States v. State of Louisiana*, 90 F.R.D. 358 (E.D. La. 1981), aff'd, *United States v. State of Louisiana*, 669 F.2d 314 (5th Cir. 1982); *United States v. State of Louisiana*, 527 F.Supp. (E.D. La. 1981).

(1990); *Louisiana ex rel. Charles E. "Buddy" Roemer, III, Governor v. United States*, 110 S.Ct. 708 (1990). It is assumed by all parties involved, and correctly so, we believe, that the referenced dismissals for want of jurisdiction were predicated on the Supreme Court's implicit conclusion, in accordance with the motion to dismiss previously filed in the Supreme Court by the United States, that the case in the district court was not properly a three-judge district court case, see 28 U.S.C. § 2284 and former § 2281, and that accordingly the Supreme Court did not have jurisdiction of the attempted direct appeals to it from the three-judge district court. 28 U.S.C. § 1253.

After the direct appeals to the Supreme Court were lodged, and after the "protective" appeals to this Court were lodged, we stayed the appeals in this Court pending resolution of the direct appeals to the Supreme Court. It appears that the stay of the proceedings in our Court, as well as the Supreme Court's August 18, 1989 stay of the district court's judgment and orders, have terminated by their terms by virtue of the Supreme Court's January 8, 1990 dismissals of the direct appeals to it for want of jurisdiction. We subsequently denied a motion for initial en banc consideration of this case by our Court; but a briefing schedule in this Court has not been fixed.

On April 30, 1990, the three-judge district court held a status conference with the parties to this case (apparently some of the parties objected to its jurisdiction to do so), and following the status conference, the three-judge district court on May 3, 1990 issued its written "order and reasons." While this document expresses a number of opinions or legal conclusions,[2] the only actual order or decree contained therein appears in the following language thereof: "The three-judge panel is hereby dissolved, and hereinafter the case, when before the District Court, shall be presided over by Judge Schwartz [Chief Judge, United States District Court for the Eastern District of

---

[2] Including the view that the Supreme Court had implicitly ruled that the case was not one for a three-judge district court, that earlier orders of the three-judge district court remained in effect, that the district court had jurisdiction to enter further injunctive orders, and that "no stay is in effect."

Louisiana, a member of the three-judge district court panel in question] alone."[3]

On May 4, 1990, the Governor of Louisiana, purporting to represent the State of Louisiana, filed with us (in our cause No. 89-3637) a motion to remand the case to the district court, reciting, *inter alia*, as follows:

> "On April 30, 1990, the three-judge district court in the above-captioned case held a status conference in which all parties participated. At the conference, the court expressed a desire to have this case remanded for the entry of an order more appropriate to the changed circumstances of the case and to consider the question of who is the appropriate party to represent the State of Louisiana in the litigation. More specifically, the trial court expressed the concern that after the trial court entered its Order and Reasons establishing the requirements for remedy in the above-captioned case and the dates by which certain aspects of the remedy were to be effected, the passage of time and intervening events rendered unfeasible the schedule directed by the court."[4]

On May 11, 1990, the United States filed with us (in our cause No. 89-3637) its "Motion of the United States for Remand of Case to the District Court," in which the United States, through Assistant Attorney General John R. Dunne, represents, *inter alia*, as follows:

> "On April 30, 1990, the three-judge district court held a status conference with the parties to this case. At the

---

[3] Our cause No. 90-3379 is the purported appeal, by notice of appeal filed below on May 21, 1990, by the Board of Supervisors of Southern University from the May 3, 1990 "order and reasons." In light of our consolidation of our cause No. 90-3379 with our cause No. 89-3637 (itself an earlier consolidation of several appeals taken in 1989) and our remand of the case, as thus consolidated, we need not (and do not) hereby determine whether (or if so, in what respects) the May 3, 1990 "order and reasons" constitutes an appealable order.

[4] This motion continues by stating:

> "Additionally, the question of who represents the State in this litigation, the Governor or the Attorney General of the State of Louisiana, is a threshold issue which should be addressed in the first instance by the trial court."

> conference, the district court requested that the United States ask this Court to remand the case, so that the district court may take action on two issues relating to this case. [Footnote omitted.] The first issue involves the timing of the relief ordered in this case. Because the Supreme Court stayed implementation of relief while it considered the jurisdictional statements, the dates for implementation of the remedial plan are not possible to meet, and the district court is of the view that a remand is necessary to permit it to amend the orders by adjusting the dates for implementation of the remedial plan."[5]

The Attorney General of Louisiana, purporting to represent the State of Louisiana, and the Board of Supervisors of Southern University and Agricultural and Mechanical College, have filed oppositions to the said motions to remand. Although we do not have a transcript (or other written memorialization) of the proceedings at the April 30, 1990 status conference, and apparently none exists, none of the oppositions to the motions to remand question the factual accuracy of the herein above-quoted statements made in the motions for remand, and we accordingly accept as true, for purposes of this order, the factual accuracy of the said quoted statements.

We note that the district court's August 2, 1988, July 19, 1989, and August 4, 1989 orders direct extensive, broad, and sweeping changes in and reconstitution of Louisiana higher education and its structure and system of governance and administration; moreover, it is likewise evident that the schedule directed by said orders for such changes and reconstitution can no longer be met and that the passage

---

[5] The United States' motion continues by stating:

> "In addition, the court also has before it a dispute about which lawyers – those from the Governor's office or those from the state Attorney General's office – should represent the state of Louisiana in this case. The Attorney General of Louisiana, in August of 1989, filed with the district court a motion to replace counsel from the Governor's office, who were designated to represent the state of Louisiana in this case, with counsel from the state Attorney General's office. Counsel from the Governor's office have disputed the Attorney General's authority to remove them from the case. The district court indicated at the status conference that it will address that issue once the case is remanded."

of time and intervening events have rendered that schedule unfeasible. The district court has asked that the case be remanded to it "for the entry of an order more appropriate to the changed circumstances of the case."

We also note that the question of whether implementation of the district court's orders should be stayed – in whole or in part – pending our resolution of the appeals in this cause is almost certainly bound to arise, and that a proper resolution of that issue may be influenced by what the various dates set for compliance are and, further, that such a stay matter should normally be addressed by the district court in the first instance. We realize that on August 4, 1989 the three-judge district court denied a stay. *See United States v. State of Louisiana*, 718 F.Supp. 521, 523-25 (E.D. La. 1989). However, conditions have changed since then, and new timetables may be appropriate, as noted. Further, after the district court denied a stay, the United States Supreme Court granted a stay. It is fair to say that such action – particularly over three dissenting votes – implies that the United States Supreme Court concluded that the parties attacking the district court's said 1988 and 1989 orders had made a strong showing that they were likely to succeed on the merits of their appeals, that they would be irreparably injured without a stay, and that balancing the equities between the parties and considerations of the public interest favored a stay. *See, e.g., Karcher v. Daggett*, 102 S.Ct. 1298 (1982) (Brennan, J., in chambers). When a stay is again applied for, it is appropriate to consider the Supreme Court's earlier action in granting a stay. *See Volkswagenwerk v. Falzon*, 103 S.Ct. 1810 (1983) (O'Connor, J., in chambers).[6]

We also note that potential questions posed by the implied holding of the Supreme Court that a three-judge district court was inappropriate may be alleviated or obviated by a remand.[7]

[6] Our remand authorizes the district court to consider, in the first instance, any application for a stay.

[7] As the May 3, 1990 "order and reason" observes, although it is clear that an erroneously convened three-judge district court has jurisdiction to dissolve itself and remit the case to the single judge to whom it was originally assigned, *see Young v. Walker*, 435 F.Supp. 1089, 1094-95 (M.D. Fla. 1977), whether the orders of an improper three-judge district court remain valid is a matter on which there is little authority which is clearly on point as so holding, although there are indications that such orders are not invalid. *See Swift & Co. v. Wickham*, 230 F.Supp. 398, 410 & n. 10 (S.D. N.Y. 1964).

Under all the circumstances, we believe that the better course is to grant the motions to remand the case to the district court. *Cf. Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976); *Ferrell v. Trailmobile*, 223 F.2d 697, 699 (5th Cir. 1955); *Alvestad v. Monsanto Co.*, 671 F.2d 908, 911 n. 2 (5th Cir. 1982). While these cases are not on "all fours," and the distinctions between them and this case might be important in another context, we nevertheless conclude that under these circumstances granting the motions to remand is appropriate.[8]

[8] Our action is not to be taken as ruling on who rightfully represents the State of Louisiana, or on the correctness or incorrectness of the conclusions or opinions expressed in the May 3, 1990 "order and reasons," or on the ultimate merits of the district court's August 1988 and July and August 1989 orders.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

STATE OF LOUISIANA

CIVIL ACTION
NO. 90-3300
SECTION "A"

ORDER

This matter is before the Court upon remand by the Fifth Circuit Court of Appeals, as per its Order filed August 29, 1990. Also pending before the Court are motions by the State of Louisiana, ex rel. William J. Guste, Jr., and the Board of Supervisors of Southern University and A&M College, to schedule a status conference.

This Court does not interpret the Fifth Circuit's remand as a mandate to re-open this costly and protracted litigation. Rather, this Court is now called upon to make certain limited determinations, in furtherance of an expeditious resolution of this case and in order to place this matter in an appropriate posture for the additional appeals that will most surely ensue. The Court accordingly enters the following orders:

(1) As an initial matter, this Court is mindful of the Fifth Circuit's observation that "potential questions posed by the implied holding of the Supreme Court that a three judge district court was inappropriate may be alleviated or obviated by a remand." In order to resolve any lingering doubts as to the full force and effect of all orders previously issued during the course of this matter's proceeding before the Three Judge Panel, the Judge of Section "A" would observe that as a member of such Panel, this Judge was always in full agreement with the Orders and determinations of the Panel and that all orders entered herein, with the possible exception of some purely housekeeping measures ordered by the Judge of Section "A" as the writing Judge, were entered after discussion among the members of the panel, with approval of all

members of the Panel. All Orders previously entered were unanimous, and this Judge is still in full agreement with such Orders. Accordingly, IT IS ORDERED that all Minute Entries, Orders and Opinions previously entered herein are HEREBY ADOPTED by the Judge of Section "A" in full *nunc pro tunc* and shall be deemed in full force and effect as if entered by this Judge sitting alone.

(2) An additional procedural matter to be resolved upon remand inheres in the motion by Attorney General Guste for a resolution of the issue of who represents the State of Louisiana in the instant proceedings.

Accordingly, IT IS ORDERED that on or before Tuesday, October 9, 1990, Attorney General Guste and the Governor's office shall each submit a memorandum addressing this issue. Any other concerned party may also file a memorandum addressing this issue but such parties are not required to do so.

The memoranda shall include citation of legal authorities on this point and shall address, as a factual matter, the extent of the Attorney General's participation in this matter prior to July 1989, including dates of Court appearances, appearances at status conferences and memoranda filed by the Attorney General. Similar information shall also be provided with respect to Mr. Kennedy's Court appearances and memoranda filed. The parties shall also address: (a) the right of the Governor to appear and participate as amicus herein, notwithstanding the Attorney General's right *vel non* to appear herein on behalf of the State; and (b) whether the Attorney General acquiesced in the Governor's representation of the State herein by his failure to object prior to July 1989 and/or by his failure to take a more active role in the handling of this matter on behalf of the State prior to July 1989.

(3) IT IS FURTHER ORDERED that on or before October 11, 1990, all parties shall also submit in writing any objections to this Court's proposed revisions to the Opinion and Order of July 19, 1989, as supplemented by Order by August 4, 1989, which proposed revisions are attached hereto as Exhibit A.

The parties shall submit three copies of all memoranda and objections filed pursuant to this Minute Entry, in addition to the original of such pleadings.

In light of this Court's interpretation of its instructions upon remand and the matters ordered above, the motions to schedule a status conference are HEREBY DENIED, reserving to the Court the right to schedule any hearing it may deem necessary following review of the memoranda and objections filed in compliance with this Minute Entry.

New Orleans, Louisiana, this 21st day of September, 1990.

/s/_____
UNITED STATES DISTRICT
JUDGE

MINUTE ENTRY
OCTOBER 4, 1990
SCHWARTZ, J.

UNITED STATES OF AMERICA
VERSUS
STATE OF LOUISIANA

CIVIL ACTION
NO. 80-3300
SECTION "A"

This matter is before the Court on the motion of the State of Louisiana ex rel. Guste to schedule a status conference and upset the current schedule for filing memoranda set forth in the Court's Order of September 21, 1990 in light of the *en banc* decision by the United States Court of Appeal for the Fifth Circuit in *Ayers v. Allain*. IT IS ORDERED that the State of Louisiana's motion for status conference is DENIED.

IT IS FURTHER ORDERED that the schedule for filing memoranda set forth in this Court's Order of September 21, 1990 will not be upset, and the parties are to comply with the dates set forth in that Order.

IT IS FURTHER ORDERED that any party wishing to file a reply memorandum shall do so by October 26, 1990.

IT IS FURTHER ORDERED that any party wishing to respond to the State of Louisiana ex rel. Guste's October 3, 1990 motion shall do so by October 26, 1990.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA *et al.*,

Defendants.

Civil Action No. 80-3300
Section "A"

STATE OF LOUISIANA
EX REL. WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CHARLES E. "BUDDY" ROEMER, III,
GOVERNOR, JOHN N. KENNEDY,
JOSEPH LEVIN, JR. AND
CARLA CALOBRISI,

Defendants.

Civil Action No.____

MOTION TO TRANSFER AND CONSOLIDATE

Pursuant to Rule 1.051E of the Local Rules for the United States District Court for the Eastern District of Louisiana, Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully move to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" of the Eastern District of Louisiana. Further, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, Defendants move to consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*, presently pending

in the Eastern District of Louisiana before the Honorable Charles Schwartz, Jr. Defendants submit this motion simultaneously with the filing of Defendants' Notice of Removal of Action, a copy of which is attached hereto. Defendants submit the attached Memorandum of Points and Authorities in support of this motion.

Respectfully submitted,

/s/

Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

John Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/

Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA *et al.*,

Defendants.

Civil Action No. 80-3300
Section "A"

STATE OF LOUISIANA
EX REL. WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CHARLES E. "BUDDY" ROEMER, III,
GOVERNOR, JOHN N. KENNEDY,
JOSEPH LEVIN, JR. AND
CARLA CALOBRISI,

Defendants.

Civil Action No.____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER AND CONSOLIDATE

Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully request this Court to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" of the Eastern District of Louisiana. Defendants request further that this

Court consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*, presently pending in the Eastern District of Louisiana before the Honorable Charles Schwartz, Jr.

Civil Action Number 80-3300, *United States v. Louisiana*, has been pending in this and other federal courts since 1974. One of the primary issues currently being litigated is the matter of who is the proper representative of the State of Louisiana, the Attorney General or the Governor, in federal court litigation to which the State is a party. The action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, was commenced on or about October 9, 1990, in the Louisiana Civil District Court for Orleans Parish. Defendants filed a Notice to Remove Case, pursuant to 28 U.S.C. Section 1441, on October 12, 1990. The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief is whether the Governor or the Attorney General is the proper representative of the State of Louisiana in federal court litigation to which the State is a party, the same question of law and fact pending before this Court in Civil Action Number 80-3300, *United States v. Louisiana*.

Rule 1.051E of the Local Rules for the United States District Court for the Eastern District of Louisiana provides that:

> In order to promote judicial economy and conserve judicial resources . . . all [collateral] actions . . . shall be transferred to the section to which the matter having the lowest docket number has been allotted . . . .

Thus, it is appropriate for this Court to transfer *State of Louisiana ex rel. Guste v. Roemer, et al.*, to Section "A".

Further, Rule 42(a) of the Federal Rules of Civil Procedure provides that:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing . . . of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such

orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A common question, both of law and fact, exists in the two above entitled actions. This Court has broad discretion to order consolidation if, under the circumstances, such consolidation will foster clarity, efficiency and the avoidance of confusion. *Miller v. United States Postal Service*, 729 F.2d 1033, 1036 (5th Cir. 1984). *See In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977). The two actions involve a common question of both law and fact – the determination of the proper representative of the State of Louisiana in federal court litigation to which the State is a party. Under the circumstances, consolidation of the actions will promote clarity and efficiency while preventing any confusion or delay.

For the foregoing reasons, Defendants respectfully move this Court to transfer the action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi*, to Section "A" and to consolidate the action with Civil Action Number 80-3300, *United States v. Louisiana*.

Respectfully submitted,

/s/

Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

John Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/

Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/

Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 1990, a copy of the foregoing NOTICE OF HEARING; MOTION TO TRANSFER AND CONSOLIDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER AND CONSOLIDATE; AND PROPOSED ORDER was sent by U.S. Mail, first class, postage prepaid, to the following:

Mark L. Gross, Esq.
Appellate Section
Civil Rights Division
United States Department of Justice
Post Office Box 66078
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20035-6078

William J. Jefferson, Esq.
Jefferson, Bryan, Jupiter, Lewis & Blanson
650 Poydras Street
Suite 1850
New Orleans, Louisiana 70130

Robert Kutcher, Esq.
Bronfin, Heller, Steinberg and Berins
650 Poydras Street
Suite 2500
New Orleans, Louisiana 70130

W. Shelby McKenzie, Esq.
Nancy Tyler, Esq.
Taylor, Porter, Brooks and Phillips
451 Florida Boulevard
Baton Rouge, Louisiana 70801

Thomas N. Todd, Esq.
1 North LaSalle Street
Suite 2250
Chicago, Illinois 60602

Henry N. Brown, Jr., Esq.
Bossier Parish Courthouse
Room 403
Burt Boulevard
Benton, Louisiana 71006

William J. Guste, Jr., Esq.
Attorney General
Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005

Margaret E. Woodward, Esq.
610 Poydras Street
Suite 318
New Orleans, Louisiana 70130

/s/
John N. Kennedy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES

VERSUS

STATE OF LOUISIANA

CIVIL ACTION
NO. 80-3300
SECTION "A"

MOTION TO DESIGNATE COUNSEL FOR THE STATE AND WITHDRAW DESIGNATION OF ADDITIONAL COUNSEL

Now into Court comes the State of Louisiana through Attorney General William J. Guste, Jr., who moves:

1.

Louisiana Constitution of 1974, Art. IV, Sec. 8, designates the Attorney General as the chief legal officer for the State of Louisiana: "There shall be a Department of Justice, headed by the Attorney General, who shall be the chief legal officer of the state . . . As necessary for the ascertain [sic] or protection of any right or interest of the state, the attorney general shall have the authority (1) to institute, prosecute, or intervene in any civil action or proceeding; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, . . . (b) to supercede any attorney representing the state in any civil . . . action."

2.

In 1988 and 1989, by motion with this Honorable Court and by letter to counsel, the Louisiana Attorney General designated attorneys to represent each of the various defendants in this case. Since each individual defendant board of higher education had specific legal positions and a desire for independent representation it was deemed this would be the most appropriate manner for those agencies to be able to assert their individual interests.

3.

This Honorable Court entered a judgment of liability in August of 1988 and a judgment imposing a remedy in July of 1989.

4.

This Honorable Court denied a motion for a rehearing and a stay filed by the Attorney General of the State of Louisiana and Southern University in August of 1989.

5.

Now this matter is on appeal and a fundamental state policy is at issue. Article XIV, Section 38, of the Louisiana Constitution, provides for the creation of a board of regents for higher education; a board of supervisors for L.S.U.; a board of supervisors for Southern University and a board of trustees for state colleges and universities for all other institutions of higher education. The voters of the State of Louisiana had the option in its vote on the 1974 constitution to determine whether they wanted "Alternative B" which provided for the creation of those four boards listed above or to have only two boards of higher education. The voters made a decision when they adopted the 1974 constitution to have four boards of higher education instead of only one board of higher education.

6.

The decision of this honorable court presents fundamental constitutional issues and challenges which require a unitary legal representation of the state's interest. Article X, Section 30, of the Louisiana Constitution, provides for an oath of office, sworn to by the undersigned which binds the Attorney General to represent the interests of the state and to uphold the constitution and laws of the State of Louisiana.

7.

In order that there not be any question as to the representation of the State of Louisiana and the defendants' state boards and agencies for the State of Louisiana, the undersigned designates the counsel for the State and its various Boards of Higher Education as follows: *Representation of the State of Louisiana: Attorney William J. Guste, Jr., Attorney General; Kenneth C. DeJean, First Assistant Attorney*

General; Winston W. Riddick, Executive Assistant Attorney General; Thomas S. Halligan, Assistant Attorney General; David G. Sanders; Assistant Attorney General; and Winston DeCuir, Special Assistant Attorney General. Representation of the Louisiana State University Board of Supervisors, Taylor, Porter, Brooks and Phillips, W.S. McKenzie, Esq.; Southern University Board of Supervisors, Jefferson, Bryan, Jupiter, Lewis and Blanson, William Jefferson, Esq.; Louisiana State Board of Trustees for Colleges and Universities, Bronfin, Heller, Steinberg and Berins, Robert Kutcher, Esq.; Louisiana Board of Regents, Margaret Woodward, Esq.

8.

While the Governor of Louisiana is not a party to these proceedings, he has designated the following special counsel: John Kennedy, Esq., Joseph J. Levin, Esq., and Carla Calobrizi, Esq., who are entitled to file pleadings and to make appearances herein on behalf of the Governor of Louisiana but not on behalf of the State of Louisiana.

9.

As Attorney General, I wish to further inform the Court that any other designation of additional counsel by me on behalf of the State of Louisiana or any of its defendant boards or agencies for whom I have constitutional responsibility to provide legal representation, is hereby withdrawn and therefore hereby notify the Court that only the attorneys listed above shall be representatives for the State of Louisiana in legal proceedings before this Court and on appeal in this matter.

Now therefore, I respectfully request that this Court issue an order accepting the designation of counsel for the State of Louisiana as provided for herein.

_____

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
APPELLANT

VERSUS

UNITED STATES OF AMERICA,
APPELLEE

MOTION TO SUPERSEDE AND TO WITHDRAW NAMES OF PURPORTED COUNSEL FOR STATE OF LOUISIANA AND TO STRIKE RESPONSE IN OPPOSITION TO STATE'S MOTION FOR STAY ADDRESSED TO INDIVIDUAL JUSTICE

[EXCERPTS ONLY]

TO: The Honorable Byron R. White
Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

Appellant, the State of Louisiana ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, is a defendant in this enforcement action brought by the United States of America seeking to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, §2000d-1, and the Fourteenth Amendment to the Constitution of the United States relative to desegregation of higher education within the State. Appellant, having filed its Notice of Appeal to the Supreme Court of the United States on August 10, 1989, and having filed a Motion for Stay Addressed to Individual Justice in this Honorable Court on August 11, 1989, to which was appended a copy of said Notice of Appeal, moves this Honorable Court to order the supersession by the Attorney General of the State of Louisiana over any other purported counsel for the State of Louisiana, including, without limitation, John N. Kennedy, Special Counsel to the Governor, Office of the Governor, Fourth Floor, State Capitol, P.O. Box

94004, Baton Rouge, Louisiana 70804, and Joseph J. Levin, Jr., and Carla Calobrisi, ADAMS, McCULLOUGH & BEARD, Attorneys at Law, 200 M. Street, N.W., Washington, D.C. 20036-3307, to withdraw their enrollment as additional counsel for the State of Louisiana, to strike their names as counsel for the State of Louisiana, and to strike any and all responses filed by any such counsel purportedly for or on behalf of the State of Louisiana in opposition to the motion for stay filed by appellant.

1. STATEMENT OF APPLICATIONS PREVIOUSLY MADE: On August 11, 1989, appellant filed a motion to designate counsel for the State of Louisiana with the United States District Court for the Eastern District of Louisiana (Three-Judge Panel). That court has not yet acted on said motion and, on information and belief, is researching the question of whether it still has sufficient residual jurisdiction to entertain the motion. In the meantime, however, appellant was only yesterday served with a response in opposition to appellant's motion for a stay, which response was filed by purported counsel for the State of Louisiana. Such action immediately compels a motion and decision in this Honorable Court to resolve the issue of legal representation of the state's fundamental constitutional interests at stake in these proceedings, even though the lower court is still pondering whether it or this Honorable Court has jurisdiction to decide same.

2. BRIEF STATEMENT OF THE CASE: This action was commenced on March 14, 1974, by the U.S. Attorney General on behalf of the United States to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (hereinafter referred to as Title VI). The

* * *

The authority for this Honorable Court to have granted and to continue the stay of the lower court's orders appealed from is contained in Article III of the Constitution of the United States of America, 28 U.S.C. 1651, 28 U.S.C. 201, 28 U.S.C. 2072, Rules 43 and 44 of this Honorable Court, and *Coleman v. Paccar Inc.*, 424 U.S. 1301, 96 S. Ct. 845, 47 L.Ed.2d 67 (1976).

[While appellant's research has indicated that the appeal in this case is directly to this Honorable Court, in the event that this Honorable Court should later decide that the appeal should have been taken to the U.S. Court of Appeals in and for the Fifth Circuit, then appellant intends to ask that this Honorable Court vacate the lower court's orders appealed from in order to allow the lower court to reinstate them and thereby preserve appellant's appeal to the U.S. Court of Appeals. Such was done in *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2n 215 (1968) and *Gonzalez v. Automatic Employees Credit Unit*, 419 US 90, 95 S.Ct. 289, 42 L.Ed.2d. 249 (1974).]

This Honorable Court's power to grant this particular motion is also contained in Article III of the Constitution of the United States of America, 28 U.S.C. §1651, 28 U.S.C. §201, 28 U.S.C. §2072, Rules 42, 43, and 44 of this Honorable Court, and *Coleman v. Paccar Inc.*, 424 U.S. 1301, 96 S. Ct. 845, 47 L.Ed.2d 67 (1976). This motion is ancillary not only to the merits of this appeal but specifically to the motions for and orders granting the stay as well.

If this Honorable Court has any doubts about the Attorney General's power to supersede the Governor's Special Counsel herein, it also has the power to certify this question to the Supreme Court of Louisiana in accordance with *Massachusetts v. Feeny*, 429 U.S. 66, 97 S.Ct. 345, 50 L.Ed.2d 224 (1976) and Rule 12 of the Rules of the Supreme Court of Louisiana.

* * *

Therefore, it is the Attorney General who is empowered to represent the State of Louisiana in this case on appeal, not the Governor. The Governor, as seen from the constitutional provisions quoted above, does not possess this power. Thus, when the Attorney General withdraws his authority for John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi to represent the state herein, they cease to have any right to represent the State of Louisiana in this case. However, because they are continuing to purport to represent the state against the state's own fundamental interests as specifically expressed by the Louisiana Constitution and have continued to make filings to that effect in this Honorable Court, it is necessary and urgent for this Honorable Court to order the supersession by the Attorney General of the State of

Louisiana over the Governor's Special Counsel, to withdraw their enrollment as additional counsel for the State of Louisiana, to strike their names as counsel for the State of Louisiana, and to strike any and all responses filed by any such purported counsel for or on behalf of the State of Louisiana in opposition to the motion for stay filed by appellant. [The Attorney General has no objection to their representation of the Governor himself but does object to their representation of the State of Louisiana. However, it must be pointed out that the Governor is not a party to these proceedings. Prior Governor Edwin W. Edwards was named as a party defendant in the original complaint solely in his capacity as an ex officio member of the then existing boards of education involved. However, the subsequent 1974 Constitution, which became effective January 1, 1975, changed the make-up of the boards of higher education to the present system and did not include the Governor as an ex officio member. Later, the amended complaint deleted the Governor as a party defendant in this case.]

What happened herein is that the Governor's Special Counsel did not seem at first to advocate the invalidity of any state constitutional provisions. To uphold these in litigation is the Attorney Generl's [sic] sworn duty. To uphold these in other situations and circumstances is also the ultimate, sworn duty of the Governor. The Attorney General did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered. For fifteen years of this litigation, the United States of America, the sole complainant, never advanced such a remedy. There is nothing in the Constitution of the United States of America or Title VI of the Civil Rights Act of 1964 which prohibits a state from having four boards of higher education with divided functions, instead of one board with consolidated functions. Indeed, the abolition of four boards created in 1975 does not appear to be an entirely rationalapproach [sic] to removing vestiges of prior *de jure* segregation that existed long ago under one general board and one board for one university. Nor could the Attorney General reasonably anticipate that the Governor's Special Counsel, enrolled as additional counsel for the state by the Attorney General, would abandon the duty to uphold the state's constitution.

* * *

RULE II

GROUNDS FOR DISCIPLINARY ACTION

(A) Any attorney authorized to practice before this court may be disbarred or suspended from further practice before this court or subjected to such other disciplinary action as the court finds the circumstances warrant if such attorney:

(1) Has been convicted in any court of the United States or any of its territories, commonwealths or possessions, the District of Columbia or any State of the United States of a serious crime as same is hereinafter defined, or

(2) Has been convicted of an offense not constituting a "serious crime" or has committed acts or omissions individually, or in concert with any other person or persona, which violate the laws of the United States or any territory, commonwealth or possession thereof, the District of Columbia, or of any State, whether or not said acts or omissions occur in the course of an attorney-client relationship, or the rules of this court or The Rules of Professional Conduct hereinafter adopted by this court, or

(3) Has been disbarred or suspended from the practice of law by any court of the United States, any of its territories, commonwealths or possessions, the District of Columbia or any State of the United States.

(B) The court hereby adopts The Rules of Professional Conduct adopted by the Supreme Court of the State of Louisiana, as amended from time to time by said Supreme Court, except as otherwise provided by specific rule of this court.

(C) The term "serious crime" shall include not only any felony but also any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

Rule 3.3. Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Conceal or knowingly fail to disclose that which he is required by law to reveal; however, if a lawyer discovers that his client has perpetrated a fraud on a tribunal, he shall promptly call on his client to rectify same and, if the client shall refuse to do so or be unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in Paragraph (a)(1) and (3) continue to the end of the hearing or proceeding. The duties stated in Paragraph (a)(2) and (4) are unlimited in time and apply, even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes in false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Amended Jan. 12, 1988.

Rule 4.1. Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration or justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Except upon the expressed assertion of a constitutional privilege, to fail to cooperate with the Committee on Professional Responsibility in its investigation of alleged misconduct.

(h) Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Roemer proposes superboard as college segregation remedy

by Ed Anderson
Capital bureau
8/12/88
Times Picayune

BATON ROUGE – A superboard to govern all of the state's colleges and universities is the keystone of Gov. Roemer's proposal to bring the schools in compliance with federal desegregation laws, the governor's lawyer said Thursday.

A federal court ruled last week that the state's racially divided higher education system violates civil rights laws. The court suggested several remedies, including a superboard to replace the present four-board system.

Roemer said other options he has advanced as remedies include:

•Establishing a system of junior colleges.

•Setting up "magnet schools," allowing universities to specialize in certain areas and avoid overlapping programs. For example, one college might specialize in computer programs and another in education or pharmacy.

•Establishing a flagship university.

The court had suggested junior colleges and reducing four-year schools with duplicative programs.

The court ruling came in a 1974 federal lawsuit against the state, a case in which both sides entered into a consent decree in 1981 to eliminate discrimination. The state has spent $200 million under the decree to improve black schools to attract white students, but the federal court said last week it hasn't worked.

Representatives of the schools, the federal government and the state are negotiating to reach an agreement acceptable to the federal courts before the case goes to trial next month. Roemer's plan was submitted to the negotiators Thursday, Kennedy said.

Roemer pushed a superboard proposal in the Legislature this year, but it died in the Senate. The state now has one board that oversees the predominantly white Louisiana State University System,

another that operates the predominantly black Southern University system, a third that operates other colleges and a fourth board that coordinates the other three.

Roemer to promote consolidating boards

by Carl Redman
Capitol news bureau
8/20/88
Morning Advocate

Gov. Buddy Roemer said Friday he will try to convince a federal court in New Orleans that the best way to desegregate higher education in Louisiana is to create a single management board and give the new board a year to overhaul the system.

The governor said it would be unwise for state leaders to attempt to restructure Louisiana higher education in the five weeks left before the scheduled start of a trial in federal court.

Roemer said he doesn't want to "shoot from the hip" with a desegregation plan.

The best approach is to consolidate the four boards currently in charge of the state's public colleges and universities and then to give the new board time to draft a new master plan for higher education, Roemer said.

Roemer said he is pleased that two boards — the Board of Trustees for State Colleges and Universities and the Board of Regents — have taken positions in apparent support for his proposal to settle a longstanding desegregation case.

Roemer said his plan will be put before a three-judge court in New Orleans during a status conference next week.

Roemer and his advisers have been working in recent months with parties to a 1981 state/federal desegregation agreement in an effort to come up with a desegregation plan that is acceptable to the federal court.

The 1981 decree expired Dec. 31, 1987, and parties to the case — including higher education officials and lawyers with the U.S.

Justice Department — have been trying to negotiate a settlement to avoid a Sept. 22 trial on the case.

Early this month, the court issued an order that said the state is maintaining a dual system of higher education — one system for blacks and another for whites.

In addition, the judges said, although the state spent millions of dollars to enhance black colleges under the aegis of the 1981 decree, black schools have gotten blacker and white schools whiter in the last half-dozen years.

The judges suggested several steps that might help desegregate the higher education system, including development of a junior college system, downgrading some four-year schools and merging higher education management.

Roemer is a strong proponent of a single board to replace the policy-making Board of Regents and the managing boards, the Board of Trustees, the LSU Board of Supervisors and the Southern University Board of Supervisors.

Roemer reiterated Friday his position that merger of the boards should be done as a precursor to any other dramatic changes in higher education.

In addition, Roemer said he will suggest to the court that once higher education management is consolidated, the new board be given a year to hold hearings and decide the future of the state's colleges and universities.

Louisiana is the "Beirut of higher education" with its competing boards and schools, and it's impossible against that backdrop to make sweeping policy decisions about the future of the system in the next five weeks, Roemer said.

Roemer said there are only two alternatives to what he is proposing.

"One is to have the court do it, and I don't want to do that," Roemer said. "The other is to design a plan in the next five weeks. I don't believe any of the parties are ready to do that."

Roemer indicated his plan would bring discussion of the future of higher education from behind closed-door negotiating sessions among lawyers and allow public input.

Roemer said that, if the court approves his idea, he still plans to seek an amendment to change the state constitution and consolidate higher education boards.

Roemer said he doesn't know if the court can simply order such a change in the state constitution.

And, he said, if the electorate approves a change in the state constitution, it would obviate appeals of a court-ordered management consolidation.

Besides, Roemer said, "We want the people to speak on the issue."

Consolidate

Mergers depend on single board
9/19/88
Shreveport Times

Southern University-Shreveport Bossier Parish Community College and Shreveport-Bossier Vo-Tech all rolled into one? Initial reaction to a plan that would merge the three local higher education institutions was decidedly mixed, but the discussion is at least a start toward some things that must happen quickly: Formulation of a desegregation plan that works and creation of a single higher-ed board that will make it work.

Louisiana is under a strict deadline to come up with a new plan by Nov. 22 — just two months away — or a federal court will do it for us. All of this comes in the wake of a court ruling earlier this year that threw out a 1981 consent decree which, frankly, needed to be thrown out. Not only did the old decree cost the state a great deal of money, it also made very little difference in the racial composition of student bodies.

In throwing out the decree, federal judges suggested that a new plan should look at consolidation of some existing colleges and creation of a single higher education board for the state. The single-

board concept has been brought up several times in the state Legislature. It has yet to win approval, even though one board – instead of the four which now govern state institutions – would improve educational quality.

During discussion here Friday, another good reason for consolidating the boards became apparent. SUS President Robert Smith presented his college's plan to merge SUS with Bossier Community College and Shreveport-Bossier Vo-Tech – under Southern's administration.

The problem, though, is that SUS is governed by the Southern University Board of Supervisors and the Board of Regents; Bossier Parish Community College is run by the Bossier Parish School Board, which answers to the State Board of Elementary and Secondary Education; Vo-Tech comes directly under the BESE. Which, in all those governing structures, is going to give up jurisdiction over one of its institutions?

Technically, those under the BESE umbrella aren't really considered in the same category as the colleges supervised by a university board system. Because they are higher education in the sense of offering post-high school students, though, they have figured into desegregation plans – particularly when paired with a two-year school such as SUS.

They all might come together under some sort of state-wide plan for two-year community colleges. Gov. Buddy Roemer has already mentioned the possibility of creating a junior college system. Along with that, all the schools could be shifted to the general supervision of the single higher ed board. Without one board governing them all, though, devising a desegregation plan is going to fall inevitably into turf battles.

The discussion held here Friday among representatives from area colleges was part of a review process. A Northwest Louisiana subcommittee headed by Centenary's Dr. Donald Webb will report its findings to the Governor's Commission on Higher Education, with everyone racing the clock to meet the Nov. 22 deadline.

Whatever the panel's actual recommendations may eventually be, the general concepts presented here are pointing the right direction

— toward mergers, and especially toward consolidation of the state's higher boards.

State plan for colleges gets reprieve

by Dawn Ruth
Staff writer
2/25/89
Times Picayune

A federal court has rejected an attempt by the U.S. Justice Department to throw out the state's plan for desegregating public colleges in Louisiana.

The court ruled this week that the Justice Department's request to dismiss the state plan inappropriately interferes with the work of the court's specially appointed education expert, who is seeking to negotiate a desegregation agreement among the department, state officials and school representatives.

The court ruled in August that the state's racially divided system of public higher education violates civil rights laws, and it asked for proposals to integrate the schools. But plans submitted by Gov. Roemer's administration, the Justice Department, the state's predominantly black schools and others were found wanting by the court, which named the expert, or special master, to oversee a solution.

Special Master Paul R. Verkuil, a former Tulane University Law School dean who now is president of the College of William and Mary in Virginia, will begin hearings March 7 and recommend a desegregation plan by the end of the month.

The Justice Department asked the court last week to disregard the state's college desegregation plan, calling it "a plea to maintain the status quo."

Roemer's plan would replace the four-board system of state college management with a single superboard, and leave most desegregation decisions up to that board. The state plan also would establish a system of two-year colleges, and require tougher admissions requirements at some universities.

John Kennedy, special counsel to the governor, said he is pleased with the court's decision.

"The state believes its plan will desegregate higher education in an educationally sound way," Kennedy said. "We also believe that the Justice Department's plan will not.

"The Justice Department's plan is really a school destruction plan," he said. "It will lower the quality of education for all of our schools and it will stand Louisiana's system of public higher education on its head."

The Justice Department's plan focuses on establishing two new campuses and transferring programs from predominantly white schools to predominantly black schools.

Court: College desegregation depositions should be public

by Steve Cannizaro
Staff writer
3/2/89
Times Picayune

Pre-trial depositions in Louisiana's college desegregation case should be open to the public and not sealed, a federal special master ruled Wednesday.

Both the Justice Department and the Southern University System asked that pre-trial statements not be made public for fear they could be misinterpreted or embarrassing.

But Paul Verkuil, a former dean of the Tulane University Law School and now president of the College of William and Mary in Virginia, rejected their requests.

Verkuil met with attorneys for the state, federal government and the public universities to work out details for hearings, which start March 7.

Verkuil has said he will recommend a desegregation plan by the end of the month.

John Kennedy, attorney for Gov. Roemer, said he was pleased that Verkuil won't prevent depositions from being seen by the media and public.

"The students, parents and faculty of the schools and the state's taxpayers have a right to know every basis of a decision" in the case, Kennedy said of pre-trial testimony.

The Times-Picayune and Capital City Press in Baton Rouge jointly filed motions opposing sealing the transcripts.

Kennedy said the state will release the transcripts if no appeals are filed. None was filed Wednesday.

The court ruled in August that the state's racially divided system of public higher education violates civil rights laws. It asked for proposals from all sides to integrate the schools.

Plans submitted by Gov. Roemer's administration, the Justice Department, the state's predominantly black schools and others were found wanting by the court, which named Verkuil special master to oversee a solution.

Roemer's plan would replace the four-board system of state college management with a single superboard and leave most desegregation decisions up to that board.

It would also establish a system of two-year colleges and require tougher admission requirements at some universities.

The Justice Department plan focuses on establishing two new campuses and transfers some programs from predominantly white schools to predominantly black schools.

The battle is over a seven-year-old court agreement, or consent decree, between the state and federal government. In the consent decree, the state promised to erase the vestiges of segregation in its public college system and has spent $200 million to improve black schools to attract white students. But the federal court said it hasn't worked.

The federal judges on the panel, District Judges Charles Schwartz and Veronica Wicker and Appeals Court Judge John Minor Wisdom, have said a drastic change may be required.

It may require, they have said, reducing the number of four-year colleges with duplicate programs, setting up a system of junior colleges and giving a single board authority to run the state's colleges and universities.

The state now has one board that oversees the predominantly white Louisiana State University System, another that operates the predominantly black Southern University System, a third that operates other colleges and a fourth board coordinating the former boards.

Deseg plan's final briefs submitted

by Karen Didier
Capitol news bureau
Morning Advocate
4/2/89

Attorneys have submitted the final arguments on how to desegregate the state's colleges, with representatives of Southern University asking for $200 million to upgrade programs and facilities at its three campuses and lawyers for the state reiterating the governor's call for a single university governing board.

Briefs submitted by the Board of Regents and the LSU Board of Supervisors in the state's college desegregation lawsuit track that of arguments made by attorneys for the state.

The 15-year-old lawsuit is now in the hands of special master Paul Verkuil, who was appointed last December by a three-judge federal court to draft a desegregation plan for state colleges after attorneys in the case failed to reach agreement on a proposal.

In addition to a single governing board, which would replace the four boards currently in place, the state plans calls [sic] for:

•The assignment of a unique role, scope and mission by the single board to each institution.

•The establishment of entrance requirements at some institutions.

•The creation of a comprehensive community college system with a new community college in Baton Rouge.

•The elimination of unnecessary program duplication among institutions.

•The establishment of scholarships to attract black students to predominantly white schools and vice versa.

The cornerstone of the state's plan is the creation of the single governing board to take the place of the Southern University Board of Supervisors, the LSU Board of Supervisors, the Board of Regents and the Board of Trustees for State Colleges and Universities.

"The current multi-board and multi-system governance structure for higher education in Louisiana promotes, by its very existence, competitiveness and discord which has interfered in its effectiveness and has become destructive to higher education in Louisiana," state attorneys John Kennedy and Joseph Levin Jr. say in their argument to Verkuil.

The shortage of state funds for colleges, which has occurred as the result of a drop in oil prices, has turned institutions and boards against one another, the state argued.

The Southern University Board of Supervisors has adamantly opposed the one-board plan and continued to do so in its final argument to Verkuil.

"Higher education governance structure and higher education desegregation are separate issues. A successful plan of higher education desegregation does not depend upon a particular form of higher education governance," said Southern's attorney, state Sen. William Jefferson, D-New Orleans.

"A successful plan of higher education desegregation depends on commitment of resources and motivation to get the job done . . .", Jefferson said.

He argued that the state Board of Regents now has the authority to provide the oversight and management the state wants vested in the new single board.

However, in its brief to the court, Board of Regents attorney Peggy Woodward noted that the resistance to change exhibited by every college in the state can only be overcome by the creation of a single governing board.

"The present management boards are too wedded to their advocacy functions to subordinate institutional concerns to a statewide plan; and the Board of Regents is too weak to rein them in. A statewide plan, enforced by a single governing board, is Louisiana's only hope for pursuing desegregation without sacrificing quality," Woodward wrote.

Southern's desegregation plan focuses on the continued "enhancement" of its academic programs and facilities, and the transfer of high-demand programs from white schools to black institutions.

The state, regents and LSU argue against such directives.

Jefferson said that Southern's physical facilities and academic programs have not been as well-financed by the state as have those at white institutions.

Programs started under a 1981 state/federal desegregation agreement, known as the consent decree, were not given the support they needed, Jefferson said, leading to their failure to produce the desired result of attracting white students to the black campuses.

"The required enhancement of the physical facilities at the institutions of Southern University to reach the goal of comparability (with white schools) should be determined by following a comprehensive study, but should be no less than $65 million," Jefferson wrote.

He said Southern needs $125 million to permit its programs to receive the appropriate accreditation and "make the university more competitive for other-race students."

But Woodward argued for the Board of Regents that the consent decree programs and construction efforts at the predominantly black schools were more than adequately funded by the state during the six-year life of the decree.

As an example, Woodward pointed to Southern's nursing school, which was established under the consent decree.

In 1986-87, Southeastern Louisiana University in Hammond spent $903,751 on its nursing program, which enrolled 677 students. In the same year, Southern, which had one-tenth the students enrolled in its nursing program, requested $909,723 for the program but received only $464,795.

Woodward said the expenditures figure out to $7,377 per nursing student at Southern compared to $1,335 per nursing student at Southeastern.

"Perhaps the most telling argument against the claim that the predominantly black institutions were underfunded is the fact that they did not expend all the moneys appropriated to them," Woodward wrote. "For instance, from 1982-83 through 1987-88, Southern requested $68,767,709 in supplemental funding for consent decree programs. It is now complaining that it was appropriated only $50,418,193. Yet, during that same period, Southern expended only $44,247,648, returning the unspent balance of more than $6 million.

"It is difficult to understand how the system could have needed more when it was unable to spend all it had," Woodward argued.

Also, Woodward said the consent decree programs attracted very few white students to the predominantly black campuses and, in fact, made the black campuses more attractive to black students.

Over a seven-year period, Woodward said the white enrollment at predominantly black schools "increased from a negligible .3 percent to a negligible 1.2 percent."

However, during the same time period, black enrollments at predominantly white universities sharply declined from 57 percent in 1981 to 47 in 1988, Woodward wrote.

"Because this was a period of relatively stable black enrollments, it is apparent that the gains made at the predominantly black institutions were realized at the expense of predominantly white institutions . . . . Thus, the enhancements of the predominantly black institutions made them more attractive to blacks, not whites," Woodward wrote, adding that such results should "counsel against making the same mistake."

LOUISIANA STATUTES ANNOTATED
CONSTITUTION
ARTICLE IV. EXECUTIVE BRANCH

§8. Attorney General; Powers and Duties

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

LOUISIANA STATUTES ANNOTATED
CONSTITUTION
ARTICLE IV. EXECUTIVE BRANCH

§5. Governor; Powers and Duties

Section 5. (A) Executive Authority. The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.

(B) Legislative Reports and Recommendations. The governor shall, at the beginning of each regular session, and may, at other times, make reports and recommendations and give information to the legislature concerning the affairs of state, including its complete financial condition.

(C) Departmental Reports and Information. When requested by the governor, a department head shall provide him with reports and information, in writing or otherwise, on any subject relating to the department, except matters concerning investigations of the governor's office.

(D) Operating and Capital Budget. The governor shall submit to the legislature an operating budget and a capital budget, as provided by Article VII, Section 11 of this constitution.

(E) Pardon, Commutation, Reprieve, and Remission; Board of Pardons.

(1) The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, [FN1MV] may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. However, a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.

(2) The Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him.

(F) Receipt of Bills from the Legislature. The date and hour when a bill finally passed by the legislature is delivered to the governor shall be endorsed thereon.

(G) Item veto.

(1) Except as otherwise provided by this constitution, the governor may veto any line item in an appropriation bill. Any item vetoed shall be void unless the veto is overridden as prescribed for the passage of a bill over a veto.

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

No. 90-1647 (4)

In The

Supreme Court of the United States

October Term, 1990

IN RE: STATE OF LOUISIANA *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

Petitioner,

Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana

ATTORNEY GENERAL GUSTE'S REPLY BRIEF

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

7 June, 1991

PAUL R. BAIER
Special Assistant Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Atlantic C. L. R. C. v. Engineers, 398 U.S. 281 (1970) 3

Ex parte Weaver, 570 So.2d 675 (Ala. 1990)..... 1

Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977)..... 1

Graddick v. Newman, 453 U.S. 928 (1981) 1, 4, 9

Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1 (1st Cir. 1984), *stay of mandamus denied by the full Court,* 469 U.S. 927 (1984) 2

Kline v. Burke Construction Co., 260 U.S. 226 (1922) ...3, 4

Martin v. Thornburg, 359 S.E.2d 472 (N.C. 1987)..... 1

McDowell v. State, 8 So.2d 569 (Ala. 1942) 4

Primate Protection League v. Tulane Education Fund, ___ U.S. ___, 59 L.W. 4424 (May 20, 1991)..... 2

Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 2

Saint v. Allen, 134 So. 246 (La. 1931) 1

Secretary of Admin. & Fin. v. Attorney General, 326 N.E.2d 334 (Mass. 1975)..... 8

Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926)..... 8

State ex rel. Porterie, Attorney General v. Walmsely, 160 So. 91 (La. 1935) 1

State v. Bank of Louisiana, 5 Mart. (N.S.) 327 (La. 1827)..... 1

TABLE OF AUTHORITIES – Continued

Page

State v. Texas Co., 7 So.2d 161 (La. 1942) 1

The Fair v. Kohler Die & Specialty Co., 228 U.S. 25 (1913) 10

United States v. Louisiana, 751 F. Supp. 608 (E.D. La. 1990) 1

Vendo Co. v. Lektro-Vend. Corp., 433 U.S. 623 (1977) 2

Williams v. McKeithen, No. 71-98-B (M.D. La. July 20, 1990) 9

Younger v. Harris, 401 U.S. 37 (1971) 3

CONSTITUTIONAL PROVISIONS

Louisiana Constitution:

Article IV:

Section 5 10

Section 8 ..... 1, 8, 10

STATUTORY PROVISIONS

28 U.S.C. § 1447(c) 2

28 U.S.C. § 1651 3

La. R.S. 49:257(B) 8

ARGUMENT

Several material misstatements of fact and law taint Respondents' Brief. We recite them, item for item, in order of glaring inaccuracy:

First. Surely the circumstances here are "drastic" and warrant extraordinary relief by way of mandamus. Attorney General Guste has been denied his constitutional office and the district court below has restructured Louisiana's constitutional form of government by its holding that "the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation." *United States v. Louisiana,* 751 F. Supp. 608, 617 (E.D. La. 1990). This holding violates the plain language of Art. IV, § 8 of the Louisiana Constitution of 1974, and an unbroken line of Louisiana jurisprudence holding that the Attorney General is the Sovereign's voice in court: "[H]e being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervenor." *State ex rel. Porterie, Attorney General v. Walmsely,* 160 So. 91 (La. 1935). Again,

> "The Attorney General has unquestionably the right to file suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administration officer or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution."

State v. Texas Co., 7 So.2d 161, 162 (La. 1942). *Accord, Saint v. Allen,* 134 So. 246, 248-49 (La. 1931); *State v. Bank of Louisiana,* 5 Mart. (N.S.) 327, 344 (La. 1827). The district court's holding is also contrary to every state supreme court decision in which similar clashes between Governor and Attorney General have been litigated. *Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987); *Ex parte Weaver,* 570 So.2d 675 (Ala. 1990). See also, *Graddick v. Newman,* 453 U.S. 928, 942 (1981) (Opinion of Rehnquist, J.) ("the Alabama

Supreme Court consistently has held that the Attorney General's authority is independent of the Governor"). And what does Governor's counsel say of these authorities? Nothing.

The gross violation of state sovereignty manifest in the removal of *Guste v. Roemer* to federal court raises "considerations of comity between state and federal courts," *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 31 (1943), that alone justify issuance of the extraordinary writ of mandamus. *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1 (1st Cir. 1984), *stay of mandamus denied by the full Court*, 469 U.S. 927 (1984). Congress has decreed that "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over case removed from state court], the case *shall be remanded.*" 28 U.S.C. § 1447(c) (our emphasis). The lack of federal subject matter jurisdiction over Attorney General Guste's state court petition is patent on the face of the petition. Removal was improper and Attorney General Guste has been denied his "right to sue in Louisiana Court–the forum of [his] choice." *Primate Protection League v. Tulane Education Fund*, ___ U.S. ___, 59 L.W. 4424, 4425 (May 20, 1991).

That the state representation question was pending in federal court, as ancillary to the merits in No. 80-3300, has no effect whatever on Attorney General Guste's exercise of his right to resort to the courts of Louisiana for a definitive resolution of the dispute between the Governor and the Attorney General. As Justice Rehnquist (as he then was) has said: "We have never viewed parallel in personam actions as interfering with the jurisdiction of either court." *Vendo Co. v. Lektro-Vend. Corp.*, 433 U.S. 623, 642 (1977). And more:

> "[A]n action brought to enforce [a personal liability] does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."

Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922). It is simply not true that "Mr. Guste's state court petition constituted no more than an eleventh hour attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination." Brief for Respondents, p. 17. The district court below, no doubt, would have ruled as it saw fit. Our point is that "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic C. L. R. C. v. Engineers,* 398 U.S. 281, 295 (1970). What Justice Black said about the strictures of the "All Writs Act," 28 U.S.C. Sec. 1651, applies with equal force to Congress's severely limiting removal jurisdiction:

> "[I]t is certainly likely that one reason stemmed from the essentially federal nature of our national government. When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. . . . One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies."

Id. at 285. It strains credulity to think that Justice Black, the voice of "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), would sit still for one moment in the face of the Governor's removal of Attorney General Guste's Petition from State Court. And it is the law in Alabama, as in Louisiana, that:

> "The Attorney General is a constitutional officer and member of the Executive Department of the State government. Constitution 1901, section 112. The statutory authority of the Attorney General . . . provides: 'The attorney general is authorized to institute and prosecute, in the name of the state, all suits and other proceedings at law or in equity,

> necessary to protect the rights and interests of the state.'
>
> "The authority conferred on the Attorney General by the foregoing statute is not inconsistent with the authority conferred on the Governor by Title 7, section 73, Code of 1940."

McDowell v. State, 8 So.2d 569, 570 (Ala. 1942) (citation omitted); *accord, Graddick v. Newman,* 453 U.S. 928, 942 (1981) (Opinion of Rehnquist, J.). Neither under the rubric of "artful pleading" nor under the rubric of removal jurisdiction should this case have been divested from the Civil District Court for the Parish of Orleans, which was *constitutionally* "free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Kline v. Burke Construction Co.,* 260 U.S. at 230.

Moreover, time plainly is of the essence here, since Attorney General Guste's term of office expires January 13, 1992, and he has publicly announced that he will not seek reelection. Unless mandamus issues now, it is likely his efforts to vindicate the prerogatives of his office and his personal integrity, which has been impugned by the district court ("willful violation" of ethical rules), 751 F. Supp. 616, and by Governor's counsel here ("his willful violation of procedural and ethical standards"), Respondents' Brief, p. 21 *et seq.*, will be dismissed as moot. Remedy by appeal is plainly inadequate and mandamus should issue to correct the drastic disruption of state sovereignty and the patent disregard of the strictures of removal jurisdiction evident in the holding below.

Second. Governor's counsel accuse Attorney General Guste of claiming

> "that *he did not know* and could not reasonably be expected to know that a single board might have been part of the district court's remedy. Since that

> time, Mr. Guste has offered no explanation for his prior statements before this Court." (our emphasis)

Governor's Brief, p. 26. This accusation of "misrepresentation" (p. 26) and of "making false statements" (p. 24) in violation of the rules of Professional Conduct is recklessly untrue. Attorney General Guste has never claimed that *he did not know* a single-board remedy was in the offing. What General Guste told this Court was that he "*did not and could not reasonably expect* that the abolition of the four boards of higher education would become part of the remedial scheme *actually ordered* [by the trial court]." Supercession Motion (Appendix at 43a). Governor's counsel add: "The absolute falsity of Mr. Guste's assertion regarding the single board issue is easily exposed upon review of that remedy's substantial history in the case." Governor's Brief, p. 25. This is another attempt to convert General Guste's legal judgment into false swearing, but it will not do. For fifteen years of this litigation, the United States of America, the sole complainant, never once advanced such a remedy. There is nothing in the Constitution of the United States or Title VI of the Civil Rights Act of 1964 which prohibits a state from having four boards of higher education with divided functions, instead of one board with consolidated functions. Indeed, the abolition of four boards created in 1975 is hardly a rational approach to removing any vestiges of prior *de jure* segregation that existed long ago under one general board. Nor could the Attorney General reasonably anticipate that Governor's counsel, enrolled as *additional* counsel for the State by the Attorney General, would oppose General Guste's application for a stay and move to oust the Attorney General as post-trial counsel for the State. Governor's Roemer's counsel seek to convert their limited enrollment as trial counsel on remedy, proffering

the Governor's policy choices,[1] into an unlimited tenure to deny the Sovereign will of the State all the way to the Supreme Court of the United States. This is not Louisiana's system of constitutional order, nor of any other state in the Union.

As for the assertion that "Mr. Guste has offered no explanation for his prior statements before this Court" (Governor's Brief, p. 26), we direct Your Honor's attention to the opening of our Memorandum in Opposition to Governor Roemer's Motion to Dismiss in the Supreme Court of the United States, Oct. Term 1989, No. 89-556, wherein General Guste explained to this Court:

> "The short answer – and all we need say here – is that Attorney General Guste sincerely believes, as we have shown in our Jurisdictional Statement, that it was beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure on the record below. Given this court's ruling in *Minnesota State Senate v. Beens,* 406 U.S. 187, 197, 200 (1972), which the Governor's Counsel's Motion to Dismiss ignores, the Attorney General stands by his assertion and he disagrees entirely with the Governor's Counsel's view (State of Louisiana Opposition to Application for Stay, p. 18) that 'the remedy does not represent an over-intrusive infringement by the federal court on Louisiana's interest in managing its

---

[1] Contrary to the impression Governor's counsel attempt to convey, even the District Court found that during the State's defense on liability, "Mr. Kennedy was not enrolled as counsel in the case and did not actually participate in the State's defense nor in the preparation of the [State's liability] memorandum." (Guste App. 6a). See also Decuir Affidavit (Guste App. pp. 53a-56a).

> own affairs.' Nowhere has Attorney General Guste denied knowing that the Governor and his counsel favored the single-board remedy. The supposed 'bald assertion that he did not know about the single board issue,' recited in the Governor's Motion to Dismiss, p. 12, comes out of thin air."

So too, here, Governor's counsel's assertion of "the Attorney General's prior claims of ignorance as to the Governor's proposed remedy" (Brief, p. 25) is pure fiction and, we hasten to add, wholly undocumented.

Third. Governor's counsel mistakenly assume that the judgment designating Kennedy and Levin as "*sole* trial counsel representing the State of Louisiana in Civil Action No. 80-3300." 751 F. Supp. at 620 (our emphasis), "necessarily determined the entirety of the Attorney General's declaratory judgment suit," Governor's Brief, p. 9. It is a fact that the trial is over; the case has been dismissed, ironically, by the district court on General Guste's post-trial motion for relief from judgment. R. Doc. 452. An obvious question is who will represent the State of Louisiana on the United States' appeal of the judgment dismissing No. 80-3300 on the merits? The judgment below says nothing at all about Louisiana's legal representative *on appeal.* We say that Attorney General Guste is Louisiana's lawyer on appeal, not Governor Roemer, who all along has pushed his "political agenda for reform of higher education," 751 F. Supp. at 612, contrary to the constitutionally-mandated, four-board structure specifically chosen by Louisiana's people. Nothing in the record contradicts Attorney General Guste's sworn statement that (Guste App. 47a):

> "I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to

> allow him to tender whatever remedial ideas he had to the Court."[2]

Mr. Kennedy specifically requested that he and other counsel be enrolled "in order that they may appear and present the position of the Governor in the remedy phase of this litigation." Decuir Affidavit, Guste App. at 54a. Given these uncontradicted affidavits, the short answer to Governor's counsel's repeated cries that General Guste "sought to reverse the State's position on remedy" (Governor's Brief, p. 4) and that "the Attorney General attempted to obstruct the orderly resolution of the case by seeking to change the State's position on remedy and removing its counsel at the last minute, after the case was virtually over" (Governor's Brief, p. 17), is that, indeed, the trial was over. Thereafter Attorney General Guste was faithfully fulfilling his sworn constitutional duty to defend the Louisiana Constitution and state laws against unwarranted judicial attack. This is precisely what the Louisiana Constitution, Art. IV, Section 8, and state law, La. R.S. 49:257(B), require of him. What's more, given the final judgment merger rule, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926), it can hardly be said that "Mr. Guste belatedly re-entered the case" (Governor's Brief, p. 25). To quote Justice Rehnquist (as he then was): "I am surely not surprised that this Attorney General has taken exception to an order opening the doors of the State's

---

[2] In accommodating the Governor's views on remedy, the Attorney General was only following accepted legal practice:

> "We note that, where there is a policy disagreement between the Attorney General and the Governor or his designee, the appropriate procedure would be for the Attorney General to appoint a special assistant to represent the Governor's interests."

Secretary of Admin. & Fin. v. Attorney General, 326 N.E.2d 334, 339 (Mass. 1975).

prisons." *Graddick v. Newman,* 453 U.S. 937, 941 (1981) (Opinion of Justice Rehnquist). The same thing surely can be said regarding the district court's order closing down Louisiana's higher education boards and merging its Law Centers into one, contrary to the wishes of all parties.

The Respondents' assertion that Attorney General Guste's state court petition "complained of the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi *solely* in connection with case number 80-3300," Governor's Brief, p. 9 (their emphasis), ignores General Guste's averral (¶10, Guste App. at 72a) that respondents "have illegally purported to act as the legal representative for the State of Louisiana *in several different civil actions and proceedings in which the State of Louisiana is a party*" (our emphasis). That General Guste was complaining about Special Counsel Kennedy's conduct in other cases as well, certainly is no secret to Mr. Kennedy, who told the Middle District of Louisiana, in the case cited at p. 19 of his Brief to Your Honors:

> "As the Court probably knows, Louisiana is currently embroiled in a number of other major pieces of litigation in Louisiana federal courts. One is United States of America v. State of Louisiana . . . The other is Clark, et al. v. Roemer. . . .
>
> "The point is that the Governor and the Attorney General have disagreed before, both in the instant litigation and in other cases important to the State."

Memorandum on the Issue of Who Represents the State filed in support of Motion to Recognize the Governor of Louisiana as the Representative of the State of Louisiana, *Williams v. McKeithen,* No. 71-98-B (M.D. La. July 20, 1990) (R. Doc. 545, Exhibit 8). Thereafter, the Attorney General and the Governor were plainly at odds at the Bar of the Supreme Court of the United States. Given this history, and Special Counsel Kennedy's own admission, 1990 WL 265971 *2, it hardly lies in Governor's counsel's hands to

deny Louisiana *ex rel.* Guste, and the General himself, of a hearing in state court on this matter of vital internal allocation of Sovereign authority. To borrow from Holmes' figure, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 25 (1913), this converts "the master" of his claim into the servant of the Governor. Surely the dispute between Attorney General Guste and Governor Roemer extends beyond No. 80-3300, as attested to by Mr. Kennedy's own artful pleading in Federal Court. And, most assuredly, the question of General Guste and Governor Roemer's respective authority under Art. IV, §§ 5 and 8, of the Louisiana Constitution 1974 is a matter that can only be decided definitively by the Louisiana Supreme Court.

CONCLUSION

For the foregoing additional reasons, the relief previously prayed for should be granted.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

7 June, 1991

PAUL R. BAIER
Special Assistant Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Attorneys for the State of Louisiana